Supreme Court, U.S.

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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE SAMMETT CORPORATION,
Petitioner,

v.

KEY ENTERPRISES OF DELAWARE, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the United States Courts of Appeals routinely vacate district court final judgments in cases which are settled while on appeal, especially as to a party which did not participate in the settlement arrangement and objected to vacatur?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.1, Petitioner, The Sammett Corporation ("Sammett"), discloses that it is a corporation incorporated in Pennsylvania, and has no parent companies, subsidiaries or affiliates at the present time.

Besides Petitioner, the appellees in the proceedings below included: Medicare Patient Aid Centers, a Florida corporation, at the time a wholly-owned subsidiary of Sammett; Venice Hospital, a Florida corporation and wholly-owned subsidiary of Gulf Area Medical Programs, also a Florida corporation; Gulf Area Medical Programs, itself; Gulf Area Diversified Services, a Florida corporation and wholly-owned subsidiary of Gulf Area Medical Programs; and Hospi-Home (d/b/a Medicare Patient Aid Centers), a joint venture general partnership half owned by Sammett and half owned by Gulf Area Diversified Services.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Eleventh Circuit ordering the dismissal of the appeal and vacating the district court's judgment, reported at 9 F.3d 893 (11th Cir. 1993), is reproduced at pages 1a-14a of the appendix to this petition ("Pet. App."). The circuit court's order granting rehearing *en banc* and vacating the panel's decision, reported at 979 F.2d 806 (11th Cir. 1992), is reproduced at Pet. App. 66a-67a. The panel opinion of the Eleventh Circuit, reported at 919 F.2d 1550 (11th Cir. 1990), is reproduced at Pet. App. 15a-51a. The opinion of the United States District Court for the Middle District of Florida, Tampa Division, reported at 703 F. Supp. 1513, is reproduced at Pet. App. 52a-65a.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was filed and entered on December 28, 1990. On January 17, 1991, Petitioner and the other appellees filed a petition for rehearing and suggestion for rehearing *en banc*, which the circuit court granted on November 10, 1992. The final opinion of the court of appeals was issued on December 1, 1993. Pet. App. 1a-14a. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATEMENT OF THE CASE

A. Introduction

Petitioner, a defendant in the underlying case who had prevailed in the district court, lost the benefit of that judgment when the court of appeals ordered it vacated following the settlement of the matter between the plaintiff (Respondent) and the most-significant defendant, but not Petitioner. The case thus presents an issue almost identical to that presented to this Court in *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 113 S. Ct. 1249, *cert. dismissed as improvidently granted*, 114 S. Ct. 425 (1993), but without the defect in standing that led to *Izumi*'s ultimate dismissal.

Inasmuch as this Court had granted certiorari in *Izumi* to resolve a split among the circuits as to the interpretation of the *Munsingwear* doctrine, it is clear that the Court is well aware of the fact that there is significant discontinuity in the way vacatur is being addressed throughout the nation. Just as *Izumi* concerned the automatic application of vacatur upon settlement in the Federal Circuit, the instant case considers the automatic application of vacatur in the Eleventh Circuit. However, inasmuch as Petitioner inarguably was a party to the litigation throughout, the instant case does not suffer from

the impediment that caused the Court to dismiss *Izumi*. Moreover, the circuit court's vacatur as to a party who had not participated in a settlement and had opposed vacatur represents an extension of the *Munsingwear* doctrine even beyond the compass of the Federal Circuit's judgment in *Izumi*.

For these reasons, Petitioner respectfully submits that the instant case presents a useful and appropriate vehicle for the Court to enunciate a consistent national rule delineating the extent to which vacatur should be ordered when a case becomes moot while on appeal.

B. Factual and Procedural History

The case originated with Respondent's complaint that, through a joint venture between Venice Hospital and a subsidiary of Petitioner set up to market durable medical equipment, the various defendants violated both federal antitrust law and Florida tort law. Pet. App. 2a. A jury returned a verdict in Respondent's favor, finding that the defendants had violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and also had tortiously interfered with Respondent's business advantage under state law. Pet. App. 2a-3a. The jury awarded Respondent $760,983, which was trebled on the antitrust counts for a total of $2,282,949. Pet. App. 3a.

Thereafter, the trial court granted the defendant's motion for judgment notwithstanding the verdict, holding that the evidence and inferences presented by Respondent were, under controlling case precedent, legally insufficient to establish antitrust or tort violations. *Key Enterprises of Delaware, Inc. v. Venice Hospital*, 703 F. Supp. 1513 (M.D. Fla. 1989). Pet. App. 52a-65a. In particular, the district court found that there was no evidence of coercion or retaliation that led to purchasers' frequent choice of the defendants' products over those of Respondent, and therefore held that the entire course of the defend-

ants' conduct was both economically rational and legally justifiable. Pet. App. 63a.

Following Respondent's appeal, a panel of the United States Court of Appeals for the Eleventh Circuit reversed the judgment of the district court and ordered the reinstatement of the jury's verdict. *Key Enterprises of Delaware, Inc. v. Venice Hospital*, 919 F.2d 1550 (11th Cir. 1990). Pet. App. 15a-51a. However, the court's mandate never issued (see Pet. App. 3a), and the panel's opinion was vacated when the circuit court as a whole granted the defendants' petition for rehearing and suggestion for rehearing *en banc*. *Key Enterprises of Delaware, Inc. v. Venice Hospital*, 979 F.2d 806 (11th Cir. 1992). Pet. App. 66a-67a.

While the rehearing petition was pending, Respondent and the lead defendant, Venice Hospital, entered into a settlement agreement. Pet. App. 3a-4a. As the *en banc* court of appeals later stated, "[d]uring the negotiations, the district court's final judgment remained in effect . . . because the panel's mandate had not issued. . . ." *Key Enterprises of Delaware, Inc. v. Venice Hospital*, 9 F.3d 893 (11th Cir. 1993). Pet. App. 3a.

There ensued a dispute among the settling parties about whether there had been a breach of their agreement, and whether the panel opinion would become law because the mandate would issue (as noted, it never did). Pet. App. 3a-4a. That dispute was soon resolved, and Venice Hospital paid to Respondent an amount covering the entire trebled jury award and Respondent's costs and attorney's fees. Pet. App. 4a-5a. The settling parties' agreement did not, however, require Respondent to execute any form of release, thus enabling Respondent to pursue additional claims against Venice Hospital and the other defendants, including Petitioner, which Respondent now has done. Pet. App. 5a.

Venice Hospital moved to withdraw its rehearing petition, and also requested that the rehearing petition as to Petitioner be involuntarily dismissed. Pet. App. 5a. The

panel rejected that effort, holding that "a settlement that requires withdrawal of a joint petition for rehearing and issuance of a mandate . . . would result in preventing consideration of the [petition] filed by [Petitioner]." Pet. App. 5a. The circuit court then took the case *en banc*. Pet. App. 67a.

After the case was briefed to the *en banc* court, and a few days before oral argument, the court asked the parties whether the now-executed settlement had rendered the appeal moot. Venice Hospital, in essence withdrawing from the appeal in view of its settlement with Respondent, said nothing. Petitioner and Respondent each filed a supplemental memorandum arguing against mootness. Respondent's argument was based upon an erroneous view of the court's mandate process. See Pet. App. 10a. Petitioner argued that the case was not moot because, notwithstanding the settlement between Respondent and Venice Hospital, Petitioner still could be subjected to the payment of interest and fees as to the original judgment, a point with which Respondent did not disagree. See Pet. App. 8a, 10a.

The bulk of Petitioner's supplemental response to the court as to mootness, and a considerable portion of the oral argument it later presented, was directed to its view that, irrespective of mootness, the judgment of the district court should not be vacated.

Reviewing the settlement agreement, itself, and the representations that the settling parties had made about it (see Pet. App. 5a), the *en banc* court of appeals found "that the settlement agreement fully disposed of [Respondent's] claims and, therefore, that no case or controversy remained at the time we decided to grant rehearing." Pet. App. 6a. Concluding that the case was moot, a holding not material to the instant petition, the Eleventh Circuit required—appropriately, given its holding that it then lacked jurisdiction—the dismissal of the appeal and the withholding of the mandate, and the negation of

the panel opinion pursuant to Fed. R. App. 42. Then, without any apparent consideration of the specifics of the case or any distinction attempted between the interests of the settling parties and the interests of Petitioner, which had opposed vacatur, the Eleventh Circuit applied a mechanistic rule requiring the vacation of the judgment of the trial court favorable to Petitioner.

Based upon Eleventh Circuit precedents, particularly *In re Ghandtchi,* 705 F.2d 1315 (11th Cir. 1983), and *Dunn v. Blue Ridge Telephone Co.,* 888 F.2d 731 (11th Cir. 1989), the court held:

> We have stated that "[w]here a case becomes moot after the district court enters judgment but before the appellate court has issued a decision, the appellate court must dismiss the appeal, vacate the district court's judgment, and remand with instructions to dismiss the case as moot." *Ghandtchi,* 705 F.2d at 1316. The same result obtains when the case is mooted at a later stage of the review process.

Pet. App. 11a.

The court premised this automatic and frequently-followed procedure on its view that its action was consistent with the "teaching and practice" of this Court, enunciated in *United States v. Munsingwear, Inc.,* 340 U.S. 36, 39-40 (1950), and *Duke Power Co. v. Greenwood County,* 299 U.S. 259, 267 (1936), and implied in *City Gas Co. v. Consolidated Gas Co.,* 499 U.S. 915 (1991), and *Great Western Sugar Co. v. Nelson,* 442 U.S. 92 (1979). Pet. App. 12a-13a.

Petitioner respectfully submits that this holding is incorrect and, in this case, inconsistent with the interests of justice and judicial economy. Petitioner therefore requests that this Court grant this petition for certiorari to resolve the important question of federal law presented, and the split among the circuits that, but for a flaw in

the petitioner's standing in *Izumi*, would have been addressed in that case.

REASONS FOR GRANTING CERTIORARI

I. THE ELEVENTH CIRCUIT ACTED ERRONEOUSLY AND INCONSISTENTLY WITH THIS COURT'S PRECEDENTS WHEN IT VACATED THE JUDGMENT OF THE DISTRICT COURT

A. *Munsingwear* and Its Related Supreme Court Cases Do Not Demand an Automatic Order of Vacatur When a Case Is Settled on Appeal

In mechanistically ordering vacatur of the district court's opinion, the Eleventh Circuit believed that it was acting consistently with this Court's holding in *Munsingwear*, 340 U.S. 36, and related cases such as *Great Western Sugar*, 442 U.S. 92, and *Duke Power*, 299 U.S. 259. The court of appeals did not mention *Karcher v. May*, 484 U.S. 72 (1987), which offers a helpful context for evaluating *Munsingwear*. In any event, the Eleventh Circuit (and as we show, *infra*, other circuits as well) has misapplied these precedents.

1. *None of the Cases Commands the Result Produced Here*

The rationale of *Munsingwear* is that a party whose appeal becomes moot has lost its opportunity for judicial review. Therefore, the lower court determination of the case should not be allowed to have preclusive effects against that party. In deciding the case, the Court specifically recognized that the vacation doctrine should only apply to those cases in which a party has been prevented from obtaining review of the judgment through "happenstance." *Munsingwear*, 340 U.S. at 39-40; *see also*, Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 Cornell L. Rev. 589 (1991).

Although the case often is considered in the context of cases that become moot because of settlements pending appeals, *Munsingwear* itself did not involve a settlement at all. It was, instead, an antitrust case that became moot during the government's appeal because of the deregulation of the commodity that was the subject of the price-fixing allegation.

Duke Power, a precursor of *Munsingwear,* did not involve mootness through settlement either. Indeed, after the acknowledgement of the new contract that ultimately caused the case to be vacated, the parties had attempted to continue litigating against each other. Similarly, *Great Western Sugar* grew out of a dispute over the arbitrability of a claim. There, an arbitration ordered by the district court was completed before the appeal was decided, a mooting "happenstance" significantly different from a settlement.[1]

2. *The Rote Application of* Munsingwear *Ignores this Court's Holding in* Karcher

One might argue that a settlement, which represents an intended action of the parties, can never constitute the sort of "happenstance" of which the *Munsingwear* court spoke. Nevertheless, the doctrine of the case frequently has been applied to cases mooted by settlements, but never, at least by this Court, to a case such as this one.

Karcher should suggest that *Munsingwear* applies only to mootness which is the product of true "happenstance," not to mootness created by the parties, and especially not to mootness created by some parties who seek to affect the rights of another party who opposes the settlement.

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[1] The Eleventh Circuit also cited *City Gas* as authority supporting automatic vacatur. While that case apparently was settled, this Court's disposition is embodied in a summary order which is of limited precedential value and does not preclude the Court's later considering more fully the question summarily adjudicated. *Edelman v. Jordan,* 415 U.S. 651, 671 (1974). *See Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 309 n.1 (1976).

Karcher involved a challenge to a New Jersey law which authorized a minute of contemplative silence in that state's public schools. The case had been defended by two officers of the state legislature who had intervened but were unsuccessful in convincing the lower court that the statute was constitutional. The intervenors lost their leadership posts in the legislature and the persons replacing them stated that they would not defend the statute, which led to the dismissal for lack of jurisdiction of an appeal to this Court.

The now-displaced intervenors asked the Court to vacate the lower court judgments of unconstitutionality. In rejecting that request, this Court distinguished the voluntary withdrawal of the appeal from the "happenstance" described in *Munsingwear* which causes mootness under "circumstances unattributable to any of the parties." *Karcher*, 484 U.S. at 83. The circumstances of the termination of the appeal here more closely resemble those of *Karcher* than they do the circuit court's conception of *Munsingwear*.

The parties who settled the underlying case here did not condition their settlement on vacatur being granted. Indeed, the issue was raised by the court itself. None of this Court's precedents, or the courts of appeals cases (discussed *infra*) following them, have commanded vacatur in the circumstances present here, where the complaining party did not enter into a settlement, opposed vacatur, and was not affected by exogenous happenstance such as a change in the controlling law. Contrariwise, *Karcher* would seem to support the view that vacatur should not enter under such circumstances. *See Clarendon, Ltd. v. Nu-West Indus., Inc.*, 936 F.2d 127, 129 (3d Cir. 1991).

B. Vacatur in this Case Did Not Serve the Interests of Justice as to Petitioner or the Public Generally

1. *Petitioner, Who Did Not Settle or Contemplate Vacatur, Has Been Denied the Benefit of a Favorable Precedent and Has Been Subjected to Considerable Economic Detriment*

As the court of appeals recognized, the settlement agreement entered into by Venice Hospital and Respondent contained no release barring a future action. Pet. App. 5a. Respondent thus was free to bring a second suit, which it has done, requesting additional damages from the original defendants for the time period forward from the settlement, but based on exactly the same causes of action and theories that had been the subject of the judgment of the district court favorable to the defendants in the case at bar. While Venice Hospital should have no cause to complain about the natural consequences of its own action, the preclusion of Petitioner's avoidance of the risk and expense of duplicative litigation under the doctrines of res judicata and collateral estoppel is unconscionable.

Munsingwear itself recognizes that when a party forgoes or dismisses its appeal without settlement, it is clear that res judicata and collateral estoppel apply to the underlying judgment. *Munsingwear,* 340 U.S. at 39. Especially at the behest of a party who did not enter into settlement, it is no less fair to provide the advantages of issue preclusion where a party surrenders appellate review as the product of a settlement from which it benefits.

As the Seventh Circuit held in *In re Memorial Hospital,* 862 F.2d 1299 (7th Cir. 1988):

> *Munsingwear* holds that the judgment in a moot case should be vacated to relieve the parties of collateral consequences when they were unable to obtain appellate review. [Appellants] were not disabled from obtaining review; they have simply chosen, for reasons

> they deem sufficient, to forego the entitlement they possess.

Id. at 1301. *See Clarendon*, 936 F.2d at 130.

In bringing its new action against Petitioner, Respondent would have its cake and eat it too, by obtaining the benefit of a result that it had sought but abandoned because of its self-initiated settlement. It is hardly unfair to apply to Respondent the issue preclusion sought by Petitioner, who was not a party to the settlement. *Compare Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982); *Center for Science in the Pub. Interest v. Regan*, 727 F.2d 1161, 1166 (D.C. Cir. 1984).

As this Court held in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971):

> In any lawsuit where a defendant . . . is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources. To the extent the defendant in the second suit may not win by asserting, without contradiction, that the plaintiff had fully and fairly, but unsuccessfully, litigated the same claim in the prior suit, the defendant's time and money are diverted from alternative uses—productive or otherwise—to relitigation of a decided issue.

Id. at 329. The Court has held similarly with respect to the collateral estoppel doctrine. *Montana v. United States*, 440 U.S. 147, 153-54 (1979).

The vacatur ordered by the court of appeals not only is inconsistent with the tenor of *Munsingwear* and *Karcher*, it unfairly burdens Petitioner—by exposing him to a protracted and expensive lawsuit that he might avoid through application of res judicata or collateral estoppel —in a manner that this Court sought to proscribe in *Blonder-Tongue* and *Montana*.

2. *Respondent's Most-Recent Antitrust Action Demonstrates That Vacatur Did Not Serve Judicial Economy. Nor Would Allowing Judicial Precedent to Be a Private Currency to Be Spent to the Detriment of Parties Not Subject to Settlement Agreements Serve the Public Interest*

Respondent's newly-undertaken litigation is an obvious enough impediment to the realization of Petitioner's interests. At a time when the judicial resources of the federal courts, especially when it comes to hearing civil cases, are so overburdened, the systemic economic effect of the action of the Eleventh Circuit which has enabled this renewed litigation is equally obvious.

The economic effect of protracted and unnecessary litigation is contradictory enough of the public interest. But there is a broader public interest that is threatened by allowing vacatur to be applied as to a party who was a dissident to the settlement/vacatur process.

The mechanistic granting of vacatur leaves profound implications for the public interest in finality, judicial economy and consistency as well as the perception of systemic legitimacy. The *Munsingwear* justification vacating a judgment because of mootness

> does not apply to mootness achieved by purchase. Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.

Izumi, 114 S. Ct. at 431 (Stevens, J., dissenting). *See Memorial Hospital*, 862 F.2d at 1302.[2] *See also* Fisch,

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[2] When a clash between genuine adversaries produces a precedent, however, the judicial system ought not allow the social value of that precedent, created at cost to the public and other litigants, to be a bargaining chip in the process of settlement. The precedent, a public act of a public official, is not the parties' property.

Id.

Rewriting History, supra; Note, *Avoiding Issue Preclusion by Settlement Conditioned Upon the Vacatur of Entered Judgments,* 96 Yale L.J. 860, 867 (1987); Michael W. Loudenslager, *Erasing the Law: The Implications of Settlements Conditioned Upon Vacatur or Reversal of Judgments,* 50 Wash. & Lee L. Rev. 1229 (1993).

In addition to depriving the public of a judicial precedent that was created with substantial public economic and implied moral investment, the decision of the Eleventh Circuit (the result of which is a new litigation that further adds to public expense) contradicts the public interest in yet another way.

It is an antitrust axiom that the law exists to protect competition, not competitors. *See, e.g., Brown Shoe Co. v. United States,* 370 U.S. 294, 320 (1962). The district court had held that Respondent's antitrust claims were legally deficient because there was no evidence of collusive or exclusionary conduct and that Petitioner's conduct was economically justifiable. Thus, the court found vigorous competition for durable medical equipment that maximized consumer choice and minimized consumer cost. The net effect of the court of appeals' vacatur of this holding, besides fomenting further litigation, was to protect a private competitor's interest without consideration of the broader interest of competition in the public marketplace.

In sum, the Eleventh Circuit erred in concluding that its policy of automatically vacating trial court decisions when cases are settled on appeal was consistent with this Court's holdings in *Munsingwear* and related cases, especially as to a non-settling party. And it was further error for the circuit court routinely to grant vacatur without balancing Respondent's personal interest in gaining the unsought removal of an adverse legal precedent against the amalgam of Petitioner's personal interest in avoiding the risk and expense of a duplicative lawsuit,

and the public interest in the maintenance of decisional law, the minimization of litigation and the maximization of competition in the medical marketplace.

II. THIS COURT SHOULD RESOLVE THE SPLIT OF AUTHORITY AMONG THE CIRCUITS AND SHOULD ARTICULATE A CONSISTENT RULE DESCRIBING THE LIMITATIONS OF THE *MUNSINGWEAR* DOCTRINE AND PROVIDING FOR A BALANCING TEST TO DETERMINE WHEN VACATUR SHOULD BE APPLIED

The Court, in considering *Izumi*, had expressed its understanding that there is a pronounced split among the circuits concerning the application of the *Munsingwear* doctrine to cases that become moot pending appellate review.[3] This split has become more troublesome since *Izumi* was dismissed.

A. Vacatur in the Eleventh and Federal Circuits

As the case at bar demonstrates, it is the practice of the Eleventh Circuit routinely to order vacatur and dismissal of district court judgments and cases when cases become moot while on appeal. Pet. App. 11a; *see, e.g., Baxter Healthcare Corp. v. Healthdyne, Inc.*, 956 F.2d 226 (11th Cir. 1992); *Kimbrough v. Bowman Transp., Inc.*, 929 F.2d 599 (11th Cir. 1991); *In re Shelby Motel Group, Inc.*, 925 F.2d 1583 (11th Cir. 1991). *But see Westmoreland v. National Transp. Safety Bd.*, 833 F.2d 1461, 1463 (11th Cir. 1987). Such vacatur usually arises from the joint motion of the parties, but the instant case demonstrates that the Eleventh Circuit is willing to raise vacatur *sua sponte* and to apply it against a party who opposes it. The inappropriateness of this mechanical approach in this case is discussed *supra*.

At least in those cases where all parties have settled, the Federal Circuit also has uniformly held that vacatur

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[3] *See* Loudenslager, *Erasing the Law*, *supra*.

of the judgment of the trial court must be ordered when settlement moots the action on appeal. *U.S. Phillips Corp. v. Windmere Corp.*, 971 F.2d 728, 731 (Fed. Cir. 1992), *cert. dismissed as improvidently granted sub nom. Izumi*,[4] 114 S. Ct. 425; *Smith Int'l, Inc. v. Hughes Tool Co.*, 839 F.2d 663, 664 (Fed. Cir. 1988); *Federal Data Corp. v. SMS Data Prods. Group, Inc.*, 819 F.2d 277, 280 (Fed. Cir. 1987).[5]

The Federal Circuit adopted this position because, it opined, failure to vacate would subject parties to continued litigation against their will.[6] As we have demonstrated, while that theory might hold true in some cases, it certainly is contradicted here, where vacatur has guaranteed continued litigation.[7]

B. Vacatur in the Second Circuit

The Federal Circuit patterned its view of vacatur on the governing precedent of the Second Circuit. *Nestle Co. v. Chester's Market, Inc.*, 756 F.2d 280 (2d Cir. 1985). *See Federal Data*, 819 F.2d at 279-80. Interestingly, there is now some question as to the extent to

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[4] The Federal Circuit, in *Windmere* (later *Izumi*) noted, *id.*, that the settlement included all of the parties on appeal and implies that it might have given more detailed consideration of vacatur under other circumstances. This suggests that the Eleventh Circuit's order of vacatur in the case at bar represents an extension of *Munsingwear* beyond the point to which the Federal Circuit is willing to take it.

[5] *Compare Mapco Alaska Petroleum, Inc. v. United States*, 30 Fed. Cl. 153 (1993).

[6] This rationale is derived from a fear that if parties' requests for vacatur are denied, litigants would be less likely to settle. Available data do not seem to support this fear. *See Izumi*, 114 S. Ct. at 431-32 (Stevens, J., dissenting).

[7] The Eighth Circuit, in *Hendrickson v. Secretary of Health & Human Services*, 774 F.2d 1355 (8th Cir. 1975), does not describe its reasoning but apparently assumes that *Munsingwear* requires vacatur when the parties settle on appeal.

which *Nestle* lays down a uniform rule in the Second Circuit.

In *Nestle*, a trademark infringement case, the court of appeals held that it was an abuse of discretion for the district court to have denied vacatur after having balanced the public interest in the finalization of judgments against the parties' interest in settlement. In reversing, the Second Circuit held that the parties' settlement interests, including avoidance of the costs and risks of further litigation, were paramount and that the district court lacked discretion to engage in balancing. As did the Federal Circuit which followed it, the Second Circuit noted that its fundamental concern was to minimize litigation and encourage settlements, a view perhaps lacking in empirical support and, in any event, inapplicable to the case at bar.

The seemingly-automatic, discretionless rule of *Nestle*, though widely cited, has shown signs of recent erosion. In a post-*Izumi* case, *Manufacturers Hanover Trust Co. v. Yanakas*, 11 F.3d 381 (2d Cir. 1993), a panel of the Second Circuit denied vacatur in a loan guarantee case in which the parties proposed a settlement contingent upon vacatur. In so doing, the court analyzed several principles gleaned from the decisions of this Court.

First, the circuit court noted, vacatur is mandatory if, while the appeal is pending, the case has become moot through "happenstance." *Munsingwear*, 340 U.S. at 39-40. Second, the court of appeals should vacate the district court's decision when the right of a party to appellate review is curtailed for reasons of mootness not attributable to that party. *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 329 (1961). Vacatur in this instance "prevents the party that lost in the district court from suffering from the estoppel effects of that court's judgment when, through no fault of its own, the losing party has lost its right to have the judgment reviewed." *Manufacturers Hanover*, 11 F.3d at 383. Nei-

ther of these principles applies to Respondent in the case at bar. The case did not become moot due to happenstance and Respondent was not prevented from obtaining review of an adverse district court ruling.

The third principle discussed by the Second Circuit in *Manufacturers Hanover* is that "the appellate court should not vacate the judgment below if the case has become moot due to the voluntary act of the losing party." *Id.* (citing *Karcher,* 484 U.S. 72). Dissecting this principle, the court recognized:

> If we were to vacate where the party that lost in the district court has taken action to moot the controversy, the result would be to allow that party to eliminate its loss without an appeal and *to deprive the winning party of the judicial protection it has fairly won.*

Id. (emphasis added). This would be precisely the inappropriate result obtained by Respondent here as a result of the Eleventh Circuit's *en banc* decision.

Manufacturers Hanover suggests an evolution within the Second Circuit, but *Nestle* has not been overruled by that circuit and a balancing of private and public interests in most potential vacatur cases would still seem to be prohibited there.

C. Vacatur in the Seventh and Third Circuits

Several courts of appeals routinely deny motions to vacate based on settlement. The Seventh Circuit, with *Memorial Hospital,* 862 F.2d 1299, is the leader in this camp, and is joined in it by the Third Circuit. *See Clarendon,* 936 F.2d at 129-30.

In *Memorial Hospital,* the court explained the rationale for a position opposite to that illustrated here by the decisions of the Eleventh and Federal Circuits and the Second Circuit in *Nestle,* by noting that prior judicial precedents are not mere private property, but have a so-

cial value produced at public cost. *Memorial Hospital,* 862 F.2d at 1302. Moreover, future litigants have a general interest in an orderly and predictable judicial system that preserves decisional law for future use. While the denial of vacatur might result in higher costs in a given case, the preservation of precedent will reduce costs and complications for litigants and judges in future cases. *Id.*[8]

D. Vacatur in the Ninth, Tenth and D.C. Circuits

The Ninth Circuit, along with the District of Columbia Circuit and, recently, the Tenth Circuit, have attempted to strike a balance between the poles of the traditional *Nestle* approach of the Second Circuit and the *Memorial Hospital* approach of the Seventh Circuit. These courts seek to balance the parties' private interest in vacatur against the facts bearing on the public interest in preserving the district court judgment. *See National Union Fire Ins. Co. v. Seafirst Corp.,* 891 F.2d 762 (9th Cir. 1989); *Ringsby,* 686 F.2d 720. *See also Oklahoma Radio Associates v. FDIC,* 3 F.3d 1436 (10th Cir. 1993); *In re United States,* 927 F.2d 626, 628 (D.C. Cir. 1991); *United States v. Garde,* 848 F.2d 1307, 1310 (D.C. Cir. 1988); *Center for Science,* 727 F.2d 1161.

Similar to the circumstances of the case at bar is *National Union,* 891 F.2d 762. The plaintiff, National Union, had several pending lawsuits against different defendants regarding claims arising out of the same transaction. In the first suit against Seafirst, the jury found for the defendant and the district court entered a judgment upon that verdict. Thereafter, National Union and Seafirst reached a settlement which required National Union to forego its

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[8] The Seventh Circuit will order vacatur in true "happenstance" cases, as the term is used in *Munsingwear. See Jordan v. Indiana High School Athletic Ass'n, Inc.,* No. 93-1435, 1994 WL 44131 (7th Cir. Feb. 15, 1994), in which a failure of standing was held to require vacatur and dismissal. *See Gould v. Bowyer,* 11 F.3d 82 (7th Cir. 1993).

rights of appeal and required Seafirst to support a motion by National Union to vacate the district court judgment.

The defendants in the other actions who had been granted summary judgment against National Union intervened to oppose the motion to vacate. In upholding the district court's refusal to vacate, the Ninth Circuit noted that

> [t]he *Munsingwear* rule is neither statutorily nor constitutionally required. It is equitable in nature, designed to maintain fairness between litigants who have been denied what would otherwise be an opportunity to challenge a prior adverse decision.

National Union, 891 F.2d at 766 (citations omitted).[9]

The court then applied an equitable balancing which tilted towards preserving the interests of third parties (much like Petitioner here) and the possibility that the judgment would preclude future litigation.

The D.C. Circuit applied similar reasoning to hold that the *Munsingwear* procedure should not be applied in certain cases "in order to avoid unfairness to parties who prevailed in the lower court." *Garde*, 848 F.2d at 1310. *See In re United States*, 927 F.2d 626. The Tenth Circuit recently adopted this balancing approach as well in *Oklahoma Radio Associates*. This approach would have made a great deal more sense in the instant case than the one applied by the Eleventh Circuit which has re-

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[9] The Ninth Circuit also held that

> When a party settles, its case is not "unreviewable" in the terms of *Munsingwear* . . . where there is no longer a case or controversy: Settlement is a conscious decision by the party, where it essentially "declines to pursue its appeal." *Karcher*, 484 U.S. at 83 . . . . This is not significantly different from when a party is satisfied with a judgment and does not appeal at all. The dispute is resolved, not made moot by action distinct from the litigation.

Id. See Ringsby, 686 F.2d at 721.

sulted in no discernible benefit to anyone other than Respondent, who continues to litigate.

CONCLUSION

Petitioner submits that, at a minimum, the Eleventh Circuit should have engaged in a balancing of public and competing private interests, but that the instant case also is susceptible to the more rigid formulation of the Seventh Circuit in *Memorial Hospital*. In any event, the Eleventh Circuit has erroneously interpreted the precedents of this Court, and the variances in interpretations among the circuits have created a confusion that should be resolved by this Court.

For these reasons, Petitioner respectfully submits that the Court should grant the petition and should reverse the judgment of the Eleventh Circuit and order the reinstatement of the judgment of the district court.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 89-3086

KEY ENTERPRISES OF DELAWARE, INC.,
Plaintiff-Appellant,

v.

VENICE HOSPITAL, SAMMETT CORPORATION AND MEDICARE PATIENT AIDS CENTER,
Defendants-Appellees,

GULF AREA DIVERSIFIED SERVICES, *et al.*,
Defendants.

Appeal from the United States District Court
for the Middle District of Florida

Dec. 1, 1993

Before TJOFLAT, Chief Judge, FAY, KRAVITCH, HATCHETT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, and CARNES, Circuit Judges *, and CLARK **, Senior Circuit Judge.

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* Judge Black recused herself and did not participate in this decision.

** Senior U.S. Circuit Judge Clark elected to participate in this decision pursuant to 28 U.S.C. § 46(c).

PER CURIAM:

In this multi-defendant antitrust case, the plaintiff appealed a judgment for the defendants entered pursuant to the defendants' motion for judgment notwithstanding the verdict. After a panel of this court reversed the district court, and while a petition for rehearing en banc was pending, the plaintiff and one of the defendants entered into a settlement agreement. Because the settling parties terminated this case when they entered into the settlement agreement, we now conclude that our order taking the case en banc improvidently issued. At the time we entered the order, no case or controversy existed. In this circuit, when a case becomes moot after the panel publishes its decision but before the mandate issues, we dismiss the appeal, vacate the district court's judgment, and remand to the district court with instructions to dismiss the case. We follow that procedure here.

The law controlling our decision in this case is relatively easy to state and has been applied consistently and summarily by this court in numerous cases. This case, however, is more complex because of the complex and somewhat confused status of the controversy before the court.

I.

This case involves the marketing of durable medical equipment in the Venice, Florida, area. Key Enterprises of Delaware, Inc., d/b/a Venice Convalescent Aids Medical Supply (VCA), brought suit on July 3, 1985, against Venice Hospital, Medicare Patient Aid Center (MPAC), and MPAC's parent, The Sammett Corporation (Sammett).[1] VCA claimed that, through a joint venture between Venice Hospital and MPAC, the defendants violated federal antitrust law and Florida law. A jury agreed and found Venice Hospital, Sammett, and MPAC liable for violations of sections 1 and 2 of the Sherman Act,

[1] VCA originally stated claims against eight other parties who are no longer in the case.

15 U.S.C. §§ 1 and 2 (1988); and for tortious interference with business relations under Florida law. The jury awarded VCA $760,983, which the district court trebled on the antitrust counts for a total of $2,282,949. The district court granted the defendants' motion for judgment notwithstanding the verdict. VCA appealed. Following oral argument, a panel of this court reversed and directed the district court to enter judgment for the plaintiff in accordance with the jury's verdict. *Key Enterprises of Del., Inc. v. Venice Hosp.*, 919 F.2d 1550, 1568-69 (11th Cir. 1990) (*Key I*), *rehearing granted and vacated by Key Enterprises of Del., Inc. v. Venice Hosp.*, 979 F.2d 806 (11th Cir.1992) (*Key II*). The defendants filed a Petition for Rehearing and Suggestion for Rehearing En Banc (Petition for Rehearing), and we stayed the mandate pending consideration thereof. *See* Fed.R. App.P. 41(a). This decision concerns what happened thereafter.

A.

Settlement negotiations between VCA and Venice Hospital began after the panel published its decision in *Key I* reversing the district court's judgment. During the negotiations, the district court's final judgment remained in effect and, because the panel's mandate had not issued, continued to provide that VCA take nothing. The settling parties, however, proceeded on the assumption that VCA already had prevailed (that is, as if the panel's decision reinstating the jury's verdict had taken effect).

On September 4, 1991, VCA moved this court to enforce a settlement agreement it had purportedly reached with Venice Hospital—the first of two such agreements presented to the court.[2] Venice Hospital asserted that no

[2] VCA stated that Venice Hospital had breached the agreement, and it moved the panel to enforce the settlement. Venice Hospital denied that it was bound by any agreement, argued that we lacked jurisdiction to enforce the agreement, and asserted that, at most, we should order the district court to conduct an evidentiary hearing to resolve the issue.

agreement had been reached and opposed VCA's motion. In its motion, VCA described an agreement requiring Venice Hospital (1) to pay $3.2 million *in full satisfaction of the judgment* against the Hospital, and (2) to move the court, on mootness grounds, to permit it to withdraw its Petition for Rehearing.[3]

VCA seemed to operate under the assumption that, if the purported settlement rendered the case moot pending our decision whether to rehear the case en banc, the panel's opinion would become law because the mandate would issue. Indeed, VCA believed that it would be able to require this court to decide the case in accordance with its dictates. Even though we had not yet acted on the petitions for rehearing and suggestion for rehearing en banc, under VCA's proposed procedure, the panel's decision would become the law of this circuit and the district court would enter judgment for VCA, which Venice Hospital would then satisfy as contemplated by the settlement agreement. In addition, while the agreement had been struck only between VCA and Venice Hospital, VCA inexplicably intended that the judgment it proposed the district court enter would apply to Sammett and MPAC as well.

Before we could rule on VCA's Motion to Enforce, VCA and Venice Hospital resolved their differences and entered into a settlement.[4] In accordance with this agree-

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[3] VCA attached to its Motion to Enforce two motions, which it and Venice Hospital were to file, that were designed to effectuate the settlement: (1) a "Joint Motion for Withdrawal of Petition for Rehearing and Suggestion for Rehearing En Banc, and for Immediate Issuance of the Mandate," and (2) a "Joint Motion for Involuntary Dismissal of [the Sammett and MPAC] Petition for Rehearing and Suggestion for Rehearing En Banc." Contrary to our precedent, *see* part II, *infra*, both motions sought issuance of the panel's mandate reversing the district court, with interest and costs on appeal.

[4] The terms of the settlement were almost identical to those of the "agreement" VCA had attached to its Motion to Enforce.

ment, (1) Venice Hospital wired into a trust account the sum of $3,272,111.11 (which included the antitrust damages as determined by the jury and trebled by the district court, amounting to $2,282,949, plus VCA's claimed taxable costs and attorney's fees through appeal, but excluded post-judgment interest); (2) Venice Hospital moved to withdraw its Petition for Rehearing, requested that the Sammett and MPAC Petition for Rehearing be involuntarily dismissed, and asked that the panel's mandate issue forthwith;[5] and (3) VCA agreed to give Venice Hospital a satisfaction of judgment after the case was returned to the district court. The agreement did not require VCA to execute a release of any kind, thus enabling VCA to pursue additional claims against Venice Hospital (as well as Sammett and MPAC).

After considering the joint motions, the panel held that "a settlement that requires withdrawal of a joint petition for rehearing and issuance of a mandate . . . would result in preventing consideration of the [Petition] filed by two of the appellees [Sammett and MPAC]," and denied the petitions without prejudice. We then took the case en banc to resolve the antitrust issues the case presented. *Key II*, 979 F.2d at 807.

B.

A careful analysis of the settlement agreement, as reported to this court in the joint motions by VCA and Venice Hospital reveals that this court should not have taken this case en banc; rather, the court should have dismissed the appeal. The representations by VCA and

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[5] Venice Hospital and VCA executed and filed joint motions (a) "for Withdrawal of Appellee Venice Hospital's Petition for Rehearing and Suggestion for Rehearing En Banc, For Withdrawal of [VCA's] Motion to Enforce Settlement Agreement [which VCA had filed on September 4, 1991] and [Venice Hospital's] Opposition Thereto, and for Immediate Issuance of Mandate," (Joint Motion to Withdraw), and (b) "for Involuntary Dismissal of [the Sammett and MPAC] Petition for Rehearing and Suggestion for Rehearing En Banc," (Joint Motion for Involuntary Dismissal).

Venice Hospital in their joint motions indicate that the settlement agreement fully disposed of VCA's claims and, therefore, that no case or controversy remained at the time we decided to grant rehearing. Instructively, the Joint Motion for Involuntary Dismissal stated that

> Based on the agreement reached between Appellant [VCA] and Appellee Venice Hospital, the balance of the Petition for Rehearing and Suggestion for Rehearing *En Banc*, brought by the remaining Appellees Sammett and MPAC, *is moot*. [VCA] has agreed to execute a Satisfaction of Judgment . . . with respect to the liability and damages found by the jury in favor of [VCA] and against *all the Appellees* in March, 1988. There is no justiciable case or controversy remaining . . . .

Joint Motion for Involuntary Dismissal at 2 (emphasis added). Additionally, the parties attached to this motion a proposed Judgment and a proposed Satisfaction of Judgment documents which taken together confirm that the settlement constituted a full—not partial—payment and satisfaction of all of VCA's claims, and that no residual issues remained to be litigated.[6] Through their joint motions, the settling parties indicated that VCA and Venice Hospital had reached a settlement that fully satisfied VCA's claims, including interest, costs, and attorneys fees through this appeal.[7] Therefore, this case

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[6] Both joint motions stress that this settlement agreement covers all claims litigated in the instant case and decided by the jury but does not preclude future claims against the same defendants in any other suit that the plaintiff might bring.

[7] In their Joint Motion for Withdrawal, VCA and Venice Hospital state that Venice Hospital "has agreed to fully pay Appellant [VCA] the damages awarded Appellant by the jury, trebled to $2,282,949, plus Appellant's taxable costs, including its attorneys fees through appeal, but excluding any postjudgment interest." Postjudgment interest would naturally be excluded because the settlement contemplated that the judgment would be paid instanter on entry of judgment in the district court. The requested judgment,

was, and is, moot and our decision to rehear en banc the substantive antitrust issues the case presented was improvident. *See Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491 (1969) ("[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.").

Although the joint motions demonstrate that no controversy remains, Sammett and MPAC nevertheless opposed the joint motions, apparently because of the settling parties' request for issuance of the panel's mandate and entry by the district court of a judgment against them. Sammett and MPAC feared that VCA would file (and, in fact, has since filed) a second, similar lawsuit based upon a continuation of the conduct addressed in this case. Depending on the similarity of the claims raised in the two cases, the district court's judgment in the instant case could have issue preclusion effects against Sammett and MPAC, and the panel's opinion might confirm that VCA had stated cognizable claims for relief.

To oppose the joint motions, Sammett and MPAC insisted that a case or controversy remained, referring to

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to be entered after the case was returned to the district court, would be for the aforementioned sum of money (disposing of all of the substantive claims at issue in the case), "with interest to accrue thereon from March 23, 1988 [the date of the superseded jury verdict], at a rate of 6.71% as provided by law, and his [sic] costs of action, including his [sic] attorneys fees through appeal."

On reaching the settlement, Venice Hospital placed $3.2 million in a trust account, an amount that would constitute "full payment and satisfaction" of all claims, thus compensating VCA for all injuries it had suffered (the vacated jury verdict merely providing a benchmark for just compensation), and covering interest on that amount (again using the date of the jury verdict as a benchmark for the date of accrual) as well as attorney's fees and costs. The settlement was designed to satisfy all claims made by VCA in this case; clearly, by its terms, it resolved the entire controversy between the parties.

language in the joint motions which suggests that VCA reserved its rights to seek a judgment, "additional" costs, and attorneys' fees from Sammett and MPAC. They argued that this reservation raised a controversy sufficient to preclude dismissal of the appeal. Yet, consistent with its claim that no controversy remains, VCA "reserved" these rights only as an alternative should the court decide to dismiss the appeal as to Venice Hospital and continue proceedings as to MPAC and Sammett.[8]

In this strange situation, Sammett and MPAC admit that a case or controversy continues between them and VCA, if at all, only because of this court's decision to order this case reheard en banc; otherwise, all fees and costs at issue would have been covered by the settlement agreement. The point at which our jurisdiction is to be determined, however, is not the present but rather the moment the case settled. As the discussion above demonstrates, no case or controversy remained at that time.[9] When we say that the order to take the case en banc improvidently issued and that the panel should have dismissed the appeal, we in effect return the case to the status it occupied when VCA and Venice Hospital informed the court that the controversy had been settled. At that point in time, there was no issue of law or fact over which the parties were still fighting.

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[8] In the Joint Motion for Involuntary Dismissal, the settling parties state that "[i]n the alternative, [VCA] reserves its full rights . . . to pursue the entry of Judgment against [Sammett and MPAC], . . . which judgment would include the additional taxable costs, including attorneys fees, incurred by [VCA] through the duration of this appeal, plus the recovery of interest on the judgment amount from . . . the date on which the original judgment was entered in favor of [VCA]." Joint Motion at 3.

[9] Of course, we had jurisdiction to determine whether, as VCA and Venice Hospital represented in their joint pleadings, the case had settled and, thus, that no case or controversy remained.

C.

On February 5, 1993, the en banc court asked the parties *sua sponte* "whether any party ha[d] an objection to the appeal being dismissed." We also invited the parties to consider *In re Ghandtchi*, 705 F.2d 1315 (11th Cir.1983), and *Dunn v. Blue Ridge Tel. Co.*, 888 F.2d 731 (11th Cir.1989). Sammett and MPAC, jointly; and VCA, responded to our inquiry; Venice Hospital did not. In both responses, the parties expressed concern for the potential res judicata effects a judgment entered in the district court (pursuant to the panel opinion as VCA proposed) would have in the second suit VCA has brought, which is now pending in the district court against Venice Hospital, Sammett, and MPAC. In that suit, VCA alleges a continuation of the conduct that gave rise to the instant case. *See Key Enterprises of Del., Inc. v. Venice Hospital*, Case No. 92-479-CIV-T-17B (M.D. Fla., filed Apr. 17, 1992) (*Key III*).

In its response to our request, VCA discards the arguments it made with Venice Hospital in the joint motions and repudiates its explicit representations that no justiciable controversy remained once they reached their settlement. Instead, VCA argues that a controversy remains (much as Sammett and MPAC had argued in their opposition to the joint motions earlier). VCA states that

> If this case was ever moot based on the settlement between VCA and Venice Hospital, it was only while the Appellees' Petition for Rehearing *En Banc* was still pending. . . . The unanimous panel's decision remained the law of the case and liability remained fixed against Appellees Sammett and MPAC. If there was no justiciable case or controversy at that time following the settlement with Venice Hospital, there certainly is one now in light of the denial of the Joint Motion for Involuntary Dismissal, the granting of the Petition for Rehearing *En Banc*, and the vacation of the panel's decision. VCA vigor-

> ously opposes each of those actions, and it urges this court to reinstate the panel's decision.

VCA's Response at 2. VCA's response also directly contradicts representations it made in the Joint Motion for Involuntary Dismissal. In that motion, VCA declared that the case is moot and that "no justiciable case or controversy remains." Now, VCA declares that

> VCA's settlement with Venice Hospital was premised on VCA's ability to fully pursue its appellate rights against Sammett and MPAC, and to obtain a judgment for damages against said Appellees. To dismiss this appeal now, after rehearing *en banc* has been granted, would cause VCA undue and tremendous prejudice.

VCA's Response at 2.

Of course, VCA is just plain wrong in its response. During the stay of the panel's mandate and our consideration of the Petition for Rehearing, the panel's decision was inoperative, in that it did not fix liability against any appellee. Pending issuance of the mandate, the district court's judgment for the appellees remained intact. Moreover, because the panel's mandate had not issued, the panel's decision was never the "law of the case." And, contrary to VCA's urging, once we have granted rehearing en banc, our precedent precludes the reinstatement of a panel opinion unless we reach the merits and conclude that the panel correctly stated the law. *Cf. Showtime/The Movie Channels, Inc. v. Covered Bridge Condominium Ass'n, Inc.*, 895 F.2d 711, 714 n. 3 (11th Cir.1990). Furthermore, VCA seems to admit that the only remaining controversy between it and Sammett and MPAC concerns the attorney's fees and costs incurred after we took the case en banc. There would have been nothing left about which to argue, however, had VCA been straightforward, informing the court in the first place that the case had been settled and that the law of

this circuit called for dismissal. We now turn to a discussion of the law that governs our disposition of this appeal.

II.

Precedent in this circuit makes clear that, when a case becomes moot during the appeal process, the proper response is for this court to dismiss the case. *See* Fed.R. App.P. 11th Cir.R. 41-2 ("In any appeal dismissed by the court because it lacks jurisdiction, no mandate shall issue, but the order of dismissal shall be issued in lieu of the mandate."). We have stated that "[w]here a case becomes moot after the district court enters judgment but before the appellate court has issued a decision, the appellate court must dismiss the appeal, vacate the district court's judgment, and remand with instructions to dismiss the case as moot." *Ghandtchi*, 705 F.2d at 1316. The same result obtains when a case is mooted at a later stage of the review process. The *Ghandtchi* court concluded that vacation or mootness was appropriate "where mootness occurred after an appellate court had issued a decision but before the losing party could seek en banc reconsideration and before the mandate had issued." [10] *Id. Accord National Solid Wastes Management Ass'n v. Alabama Dept. of Environmental Management*, 924 F.2d 1001, 1002 n. 1 (11th Cir.1991). This procedure has been followed when mootness results from a settlement of the case by the parties. For example, in *Dunn*, 888 F.2d at 732, the case was settled after the published panel opinion had been vacated by this court's order granting

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[10] VCA misstates *Ghandtchi* to "require[] dismissal '[w]here a case becomes moot after the district court enters judgment but before the appellate court has issued a decision.'" VCA's Response at 3 (quoting *Ghandtchi*, 705 F.2d at 1316). In *Ghandtchi*, however, the panel simply applied the quoted language as an analogy to its circumstances. There, the panel considered a government motion to dismiss an appeal as moot filed after the panel had decided the merits of the appeal but before the time in which the parties could seek rehearing en banc had expired.

rehearing en banc. The en banc court vacated the judgment of the district court and remanded the case with instructions that it be dismissed.[11]

This result is consistent with Supreme Court teaching and practice. The Supreme Court itself employs the vacation procedure described above when a case it has decided to review becomes moot before decision. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40, 71 S.Ct. 104, 106-07, 95 L.Ed. 36 (1950). *See also City Gas Company of Florida v. Consolidated Gas Co. of Florida, Inc.*, 499 U.S. 915, 111 S.Ct. 1300, 113 L.Ed.2d 235 (1991) (applying *Munsingwear*). And the Court has instructed generally that "[w]here it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss." *Duke Power Co. v. Greenwood County, S.C.*, 299 U.S. 259, 267, 57 S.Ct. 202, 205, 81 L.Ed. 178 (1936). *See also Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 92-93, 99 S.Ct. 2149, 2149-50, 60 L.Ed.2d 735 (1979).[12] Furthermore, the Court maintains, to allow the district court judgment to remain in effect after an appellate court has dismissed an appeal on mootness grounds is "totally at odds with the holding of *Duke*

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[11] This court has followed this vacation procedure in numerous cases in which a settlement was reached while the case was on appeal. *See, e.g., Baxter Healthcare Corp. v. Healthdyne, Inc.*, 956 F.2d 226 (11th Cir. 1992) (granting joint motion to withdraw appeal and to dismiss based on settlement); *Kimbrough v. Bowman Transportation, Inc.*, 929 F.2d 599 (11th Cir. 1991) (granting settling parties' joint motion to withdraw suggestion of rehearing en banc); *In re Shelby Motel Group, Inc.*, 925 F.2d 1583 (11th Cir. 1991).

[12] The appellate court practice of setting aside a judgment and remanding a case with directions to dismiss when it appears on appeal that a controversy is moot "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40, 71 S.Ct. at 107.

Power." Great Western Sugar, 442 U.S. at 93, 99 S.Ct. at 2150. Both the appeal and the underlying district court case must be dismissed.

These principles are easy to apply in this case, which became moot at the time the settlement was reached. The settling parties requested in their joint motions that the court issue the mandate called for by the panel's opinion. Their settlement contemplated the entry of a judgment in the district court which Venice Hospital would satisfy, but our precedent precludes the granting of the settling parties' request. Because the case became moot after the panel published its decision but before the mandate issued, we dismiss the appeal, vacate the district court's judgment, and remand to the district court, with instructions to dismiss the case.

III.

Because the precedential force of appellate decisions extends beyond any one controversy, we will not permit parties to a specific suit, or their counsel, through an agreement or otherwise, to control our statement of the law. *See Ethredge v. Hail*, 996 F.2d 1173 (11th Cir. 1993). Given that nothing was at stake for any party after the settlement of this case, any opinion of this court would be purely advisory—an outcome precluded by the Constitution. When a case settles, we dismiss both the appeal and the district court's judgment to ensure that the "rights of all parties are preserved." *Ghandtchi*, 705 F.2d at 1316 n. 1 (citing *Munsingwear*, 340 U.S. at 40, 71 S.Ct. at 107). The actions of the parties in this case illustrate all to well the wisdom of this approach.

When the settling parties filed the joint motions, no case or controversy existed. Consequently, we no longer had jurisdiction over the issues presented and should have immediately dismissed the appeal in accordance with

Ghandtchi.[13] Nevertheless, we denied the settling parties' motions and ordered that the issues presented be reheard en banc. Because we lacked a case or controversy at that time, we now vacate the order granting en banc review and return the case to the panel with instructions that it dismiss the appeal, vacate the district court's judgment, and remand the case to the district court with instructions to dismiss the case.

IT IS SO ORDERED.

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[13] While our inquiry is limited to the status of the controversy prior to our grant of rehearing en banc, we note that the settling parties subsequent actions were consistent with their representations in the joint motions. In its en banc brief, VCA states that Venice Hospital has placed the $3.2 million contemplated by the settlement agreement into a trust account, and that the settlement has been "consummated." Venice Hospital's actions speak for themselves—the hospital did not file an en banc brief and did not appear at oral argument. Indeed, Venice Hospital believed it no longer had standing before us and even moved the court for leave to file an Amicus Curiae brief. While we granted Venice Hospital's motion to proceed as an Amicus Curiae, we now note that although our local rules provide for the dismissal of an appellant, *see* Fed.R.App.P. 11th Cir.R. 42-1, the rules do not provide for the voluntary withdrawal of an appellee. Venice Hospital, therefore, remains an appellee.

APPENDIX B

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 89-3086

KEY ENTERPRISES OF DELAWARE, INC.,
Plaintiff-Appellant,
v.

VENICE HOSPITAL, SAMMETT CORPORATION AND
MEDICARE PATIENT AIDS CENTER,
Defendants-Appellees,

GULF AREA DIVERSIFIED SERVICES, ET AL.,
Defendants.

Appeal from the United States District Court
for the Middle District of Florida

Dec. 28, 1990

Before KRAVITCH and CLARK, Circuit Judges, and ATKINS*, Senior District Judge.

CLARK, Circuit Judge:

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* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

FACTS

This case concerns the rental and sale of durable medical equipment (DME) to home users in the Venice, Florida area. DME includes such things as prosthetic devices, hospital beds, oxygen equipment, wheelchairs and walkers. DME suppliers receive customers from many sources, including self-selection, referrals from hospitals, nursing homes and intermediate care facilities, home health agencies, physicians and physical therapists. The plaintiff, Venice Convalescent Aids Medical Supply (VCA), is one of several competing retailers of DME to non-institutionalized patients in the Venice, Florida area. The defendant Medicare Patient Aid Centers (MPAC) is also a DME supplier and is jointly owned by the Sammett Corporation and an affiliate of Venice Hospital.

In May 1984, the defendant Sammett established the defendant MPAC to provide DME equipment to the Venice, Florida DME market. About the same time, Venice Hospital began investigating the possibility of establishing a DME supply business and of entering into a joint venture with a home health care agency.[1] Venice Hospital contacted several pre-existing DME suppliers, including MPAC, regarding a possible joint venture. Venice Hospital also contacted several local home health agencies to discuss the home health care joint venture. Ultimately, in April 1985, an affiliate of Venice Hospital, Gulf Area Diversified Services (GADS), purchased from Sammett a one-half interest in Sammett's MPAC facility in Venice and thus established MPAC as a joint venture between Sammett and Venice Hospital's affiliate GADS. Venice Hospital is a not for profit subsidiary of Gulf Area Medi-

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[1] Home health care coordinators (or nurses) are registered nurses employed by independent companies known as home health care agencies. The agencies, through their employee nurses, provide skilled nursing care to patients in the patient's home after they are discharged from the hospital.

cal Programs which has another subsidiary, the for profit corporation, GADS.

During the course of these negotiations, the chief operating officer at Venice Hospital, Gary Bebow received a letter dated January 25, 1985 from Sam Shapiro, the president of Sammett Corp. In that letter, discussing Sammett's marketing strategy, Shapiro stated that the company "do[es] not set [its] sights only on the skimming off of captive referrals" in a highly regulated market, but that it intended to "market directly to patients and medical professionals." Shapiro testified at trial that captive referrals "refers to situations where the patients do not have the freedom of choice." He also stated that once he learned Venice Hospital was considering going into the DME business, he "thought it would be a good idea if [they] could put [their] energies together and have one less competitor in the area." Although Venice Hospital had not contacted VCA, upon learning of the possible joint venture, VCA contacted the hospital and suggested they discuss the matter. The hospital declined, noting that it had already entered into a joint venture with MPAC.

Venice Hospital is one of two existing hospitals in the Venice area and is a 312 bed acute care facility. The only other hospital in the area, Englewood, is a 100 bed facility which opened in December 1985. Venice Hospital has 76% of the available beds; patient records show it has 80% of patient admissions and 81% of the patient days in the Venice area. Venice Hospital has facilities to support most of the area residents' needs; its records show that 80% of the hospital's patients come from the Venice area. Patient records from the closest hospitals outside the Venice area show a few Venice area residents going to those neighboring hospitals. The boundaries of the hospital's certificate of need correlate to the above defined area which provides 80% of the hospital's patients.

Plaintiff's expert [2] concluded that Venice Hospital has monopoly power for acute care in the relevant geographic market.

Expert testimony adduced at trial shows that Venice Hospital patient DME referrals represent a significant portion of the total DME referral market in the Venice area. Plaintiff's expert opined that 64% of MPAC's current business comes from the hospital. The statistics showed that for the 1986-87 time frame, MPAC had 60.7% of the total DME business in Venice. This means that MPAC has garnered 39% of the total area DME market simply by capturing an indeterminate percentage of Venice Hospital's DME referrals. Plaintiff's expert noted that MPAC is now receiving approximately 85% of all referrals from Venice Hospital. Assuming MPAC's share of business generated by hospital referrals is in equilibrium with MPAC's share of new referrals, then Venice Hospital discharges represent 46% of the total DME market in the Venice area.[3] Plaintiff's expert testified, however, that MPAC's current business from the hospital had not reached equilibrium with its share of new referrals from the hospital, indicating that MPAC's current business generated by the hospital is something less than 85%. This supports the conclusion that Venice Hospital's total DME referrals represent greater than 46% of the total area DME market. Plaintiff's expert con-

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[2] Plaintiff's expert Dr. Blair has considerable expertise in the antitrust economics area. He has published numerous articles and has co-authored a text book on the subject. Additionally, he has worked with the Antitrust Division of the Justice Department and has testified in numerous trials as an antitrust expert.

[3] In a rental market where a firm's share of new referrals is increasing, the figures for current market share based on income will be lower than the figures for market share based on new referrals. Once the percentage of new referrals stabilizes and old accounts with competitors close out, the income based market share will approach the new referral market share.

cluded that the hospital represented an essential facility in terms of DME referrals. Defendant's expert contradicted this by saying that Venice Hospital DME referrals represent only 19% of the total area market.

Before the joint venture, it was common practice in the Venice DME market for home health care nurses to assist the patient in choosing the DME vendor who would supply the patient's DME needs. The home health care nurses have had training in DME usage and are capable to select DME equipment for patients. Home health care nurses are not employees of the hospital and are granted hospital privileges (access to patients) once they complete certain application and screening procedures. The plaintiff concentrated its sales efforts on the home health care nurses and phyiscians. Consequently, VCA received much of its DME business from hospital discharges and relatively little business from the other available sources. To ensure equal access among those home health agencies which have hospital privileges,[4] the hospital uses a rotation system. Several days before a patient requiring some form of follow-on care is discharged from the hospital, the hospital notifies whichever home health agency is next in the rotation. This allows a home health nurse from the agency to visit the patient and plan whatever follow-on care is needed. Pre-planning is essential to ensure that needed facilities are in place when the patient arrives home from the hospital. The home health care agencies rely on access to patients to remain in business.

The nurses testified that they would first inquire whether the patient had a choice of DME vendor; if the

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[4] Both the home health care agency and its individual nurses must be granted hospital privileges to work with the patients while they are still in Venice Hospital. There are certain documentation requirements and the agency or nurse must submit an application. The application is reviewed by the executive committee of the medical staff which makes a recommendation to the board of directors. The board makes the final decision.

patient expressed no preference, the nurse would recommend a vendor based on the equipment the patient needed and the nurse's past experience with DME companies. All nurses who testified stated that only rarely did a patient or a patient's family have a preference for a particular DME vendor.

After the joint venture was created, Venice Hospital instituted a new policy encouraging home health care nurses to select MPAC as their DME supplier. The social services director at Venice Hospital held two meetings with the home health care nurses to impress on them the fact that the hospital would prefer they use MPAC. In an interoffice memorandum, Ronald Scherra then the senior vice president of the hospital told the social services director to "refer all patients to these hospital affiliated organizations [MPAC] unless the attending physician specifically refers the patient to a different supplier." Scherra testified that the memo was strictly interoffice correspondence and did not represent hospital policy. Mark Bowers an employee of MPAC became the patient equipment coordinator in the Venice Hospital's discharge planning department; his duties included meeting with the patients with anticipated needs for DME. Prior to his employment at Venice Hospital, Bowers worked as a DME salesman and as a sales supervisor for Sammett. When he became patient equipment coordinator, Bowers had no training in follow-on health care.

Initially, the hospital structured its policy in order to prevent the home health care nurses from consulting with patients as to their DME requirements. Only after several home health care nurses complained did the hospital change its policy to allow the nurses to discuss DME requirements with patients. Thereafter, the home health nurse performed the DME assessment, that is, they determined which equipment the patient required. Nevertheless, it was Bowers who actually discussed with the patient which company would supply the needed equip-

ment. The parties stipulated, however, that Bowers both performed the assessment and arranged the equipment rental. Thus, there seems to be some conflict between the evidence and the stipulation. The parties also stipulated that if a patient, home health nurse or physician made a request for a particular DME vendor in a particular case, Bowers would honor that choice. In the absence of such a choice, Bowers referred all DME business to MPAC. However, it was not always easy for patients to exercise free choice. One prior hospital patient, who ultimately received service from the company he requested (VCA), testified in a deposition that Bowers initially told him that the hospital did not do business with VCA. Bowers dismissed this as a misunderstanding.

Prior to Bowers' arrival, no DME vendor was permitted entry to solicit business in the hospital. After the joint venture, Bowers was permitted to visit patients in the hospital and solicit DME business. When Bowers visited patients, he wore a lab coat like other hospital officials. Bowers testified that approximately 50% of the patients needing DME are referred to MPAC through operation of the default rule; it was the hospital's policy to channel all patients who expressed no preference to MPAC. Bowers also stated that of the remaining 50% —the patients who expressed a preference—70% chose MPAC. Thus, 85% of Venice Hospital patients needing DME received it from MPAC.

Only one of the home health care nurses stated that she felt pressured or leveraged by the hospital's policy to use MPAC. Those who said they did not feel pressured stated that they felt it best to cooperate with the hospital since they were guests there and relied on access to patients for their business. One nurse stated that she chose MPAC after the joint venture because she thought it best to cooperate given the "political climate" in the hospital. As noted above, at the same time negotiations between Sammett and Venice Hospital were in progress,

Venice Hospital was simultaneously considering a similar exclusive arrangement with a home health agency. All of the home health care nurses testified that they were aware of these negotiations.

The evidence establishes that within six months after MPAC entered as a partner of the hospital, VCA's business began to drop significantly. Prior to the joint venture, VCA had 72.8% of the overall DME market, whereas MPAC had only 9.2%; two years afterwards, VCA retained 30% of the market and MPAC had acquired 61% of the market. All of the home health care nurses testified that they stopped using VCA as they had before the joint venture went into effect. The majority stated that before the joint venture they used VCA because of its superior service and cleanliness. None of them stated that VCA ceased to be superior in quality or service. Several of the home health care nurses stated that MPAC's quality and service were inferior.

The hospital had different rules regarding physicians' standing orders for home health agencies and DME companies. A standing order is a request by a physician which is kept on file by the hospital. The standing order makes the physician's preference for a particular home health agency, DME company, or other service known. The hospital follows the standing order unless the physician directs otherwise. The hospital's social services director, Ms. Higgins, testified that she maintains a physicians' standing order list for home health care agencies, but considers it too burdensome to do the same for DME suppliers. She maintained that while all home health services offered basically the same service, there is a wide variation of equipment available from the various DME vendors. She informed those physicians who requested DME standing orders that they would have to indicate their preference by noting the company on the patient's chart.

Two additional factors play a pivotal role in this case. First, there is little possibility of long-term vigorous price competition in the DME market. The maximum prices firms will charge is generally determined by what Medicare and Medicaid will pay. Thus, service, in all its possible forms, becomes the primary mode of competition. Second, the typical patient is not well versed in the DME market; they do not know the equipment or the vendors. This renders them vulnerable to suggestions made by those in positions of authority.

Plaintiff contends that the antitrust laws were violated by the joint venture and the attendant policy changes channeling most of Venice Hospital's DME business to MPAC. Plaintiff alleged, inter alia, that the defendants Sammett, Venice Hospital, and MPAC violated § 1 and § 2 of the Sherman Act by coercing or unduly influencing the home health agencies to refer their patients to MPAC and by unreasonably restricting and excluding competition in the Venice DME market. Plaintiff also alleged that the defendants violated § 2 of the Sherman Act by monopolizing or attempting to monopolize the Venice DME market. Finally, plaintiff alleged that the defendants had tortiously interfered with plaintiff's business relationship with the home health agencies.

After a three-week trial, the jury, in answers to special interrogatories, found that (1) the defendants had violated § 1 of the Sherman Act by conspiring to deal exclusively with at least one home health agency (2) that defendants violated § 2 of the Sherman Act by monopolizing and/or attempting to monopolize the DME market in the Venice area (3) that the defendants violated § 2 by conspiring to monopolize the Venice DME market (4) that Venice Hospital violated § 2 by using its monopoly power to gain an unfair advantage in the DME market in Venice and (5) that the defendants tortiously interfered with plaintiff's business relationship with the home health agencies. The jury awarded the plaintiff

$760,983.00 in damages, which was then trebled on the antitrust counts to $2,282,949.00.

Following a jury trial, the defendants Venice Hospital, the Sammett Corporation and Medicare Patient Aid Centers filed a motion for judgment notwithstanding the verdict, or for new trial, or for remittitur, which the plaintiff opposed. The district court granted the defendants' JNOV motion, concluding that there was insufficient evidence to support the jury's verdict. Specifically the court concluded that "[t]he evidence simply does not support a finding that defendants' behavior was coercive or unreasonably exclusionary, or in other words, that competition was injured." The court also concluded that "defendants' conduct was economically rational, it did not exclude or restrict the freedom of the patient, home health care nurses or doctors to choose the DME vendor of their liking, nor did it unreasonably exclude other DME vendors from competing in the DME market." *Key Enterprises of Delaware, Inc. v. Venice Hosp.*, 703 F.Supp. 1513, 1519 (M.D.Fla.1989).

DISCUSSION

I. STANDARD OF REVIEW

In reviewing the grant of a judgment notwithstanding the verdict, we apply the standard set forth in *Boeing v. Shipman*, 411 F.2d 365, 374-75 (5th Cir.1969) en banc):

> On motions . . . for judgment notwithstanding the verdict the Court should consider all of the evidence —not just that evidence which supports the nonmover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is sub-

> stantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied.

More recently we have added:

> A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence.

Michigan Abrasive Co. v. Poole, 805 F.2d 1001, 1004 (11th Cir.1986). *See also Reynolds v. CLP Corp.*, 812 F.2d 671, 674 (11th Cir.1987); *Rosenfield v. Wellington Leisure Products, Inc.*, 827 F.2d 1493, 1494-95 (11th Cir.1987). We review a motion for judgment notwithstanding the verdict on the same footing as the district court. *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 841 (5th Cir.1975). When evaluating the evidence, neither the district court nor this court may *reweigh* the evidence or assess credibility. *Popham v. City of Kennesaw*, 820 F.2d 1570, 1576 (11th Cir.1987). From our examination of the rather extensive record, we have concluded that the district court departed from this rule and erred in holding that there was insufficient evidence to support the jury's finding of antitrust liability.

II. ANTITRUST CLAIMS:

A. *Anticompetitive Acts*

As with any antitrust case, this one turns on whether certain acts committed by the defendant were anticompetitive or tended to prevent competition on the merits. As noted above, VCA asserted that the defendants violated the antitrust laws in a variety of ways and cited a number of legal theories to support their arguments. The

jury found the facts to be as claimed by the plaintiff on every count. Given the importance of the defendants' anticompetitive acts to the outcome of this case, it is useful to summarize those acts here before we discuss at length each of VCA's legal claims: (1) Venice Hospital, MPAC and the Sammett Corporation entered into a reciprocal agreement with the home health care nurses whereby the nurses would preferentially recommend MPAC in exchange for continued access to the hospital's patients; (2) The hospital changed its policy which previously allowed no DME vendors access to patients, to one which allows only one DME vendor, Bowers, access to discuss DME with patients, and the hospital could offer no efficiency justification for this change; (3) Bowers acting on behalf of the hospital and MPAC held himself out as having a position of expertise and authority in the hospital; (4) The Sammett Corporation pursued the joint venture because it wanted to eliminate a potential competitor and exclude other competitors from access to captive referrals; (5) The hospital maintained different standing order rules for home health care nurses as compared to DME suppliers and could offer no legitimate reason for the distinction; (6) The hospital and MPAC through Bowers used a default rule which automatically selected MPAC if the patient did not make a choice of DME supplier, (the home health care nurses were selected on a rotating basis); (7) The hospital used its monopoly power in the acute care field to leverage itself into the DME market with the intent to avoid competition in the DME market on the merits.

The fact that the hospital gave Bowers access to the patients and how that contributed to channeling patient choice requires additional clarification. The district court reviewed the evidence and concluded that the defendants had committed no actionable anticompetitive acts. Much has been said about patient choice in this case. The district court noted that the parties stipulated that the patients had the freedom to choose any DME vendor.

However, a patient's freedom to choose under these circumstances may be illusory. The evidence presented in this case shows that patients rarely have a preference for a DME vendor.[5] The patients know very little about the equipment or the companies that rent the equipment. Thus, they are very susceptible to recommendations made by anyone who appears to be knowledgeable on the subject. It therefore becomes very easy to channel patient choice by limiting the patient's exposure to the competition. This the hospital accomplished principally in two ways. First, by changing its policy, it limited the home health care nurses' ability to discuss DME vendors with the patients prior to their discharge. The initial policy change following Bowers' arrival in the hospital was that he would discuss the patient's DME needs with the patient, make the DME assessment, and order the equipment. After several nurses complained, the hospital changed its policy and nurses were again allowed to make the DME assessment for their patients. The nurses were "encouraged" to recommend MPAC which they did because of the "political climate" at the hospital.

The hospital's second policy change was to allow one DME vendor in to solicit business from the patients. Previously it had denied vendors access to the hospital. The district court noted that the no solicitation rule was in effect before the joint venture and concluded that the rule "could not constitute evidence that the defendants behaved improperly after the joint venture." 703 F.Supp. at 1518. We disagree. The change was that the hospital now allowed an exception to the rule, but only in the case of its affiliate. The evidence was uncontroverted that MPAC is a for profit business and that Bowers is an MPAC employee. Bowers has experience as a DME

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[5] Bowers testified that approximately 50% expressed an affirmative choice; his logs showed that figure to be closer to 40%. It seems to us interesting—and the jury could have noted this as well—that there was such a large discrepancy between MPAC's evidence and the testimony presented by the home health care nurses.

salesman and supervisor of salesmen. It is obvious that he was allowed to solicit business in the hospital as an MPAC salesman. The fact that the hospital made him the DME coordinator for the hospital and allowed him to wear a lab coat obscured his role insofar as patients were concerned, but highlighted the change in policy insofar as the jury was concerned.

Appellees claim that the antitrust laws do not compel them to grant other DME vendors access to their patients and that they have a right to deal with whomever they choose. As the Supreme Court has stated: "We do not dispute that general right. 'But the word "right" is one of the most depective of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified.' " *Lorain Journal Co. v. United States*, 342 U.S. 143, 72 S.Ct. 181, 187, 96 L.Ed. 162 (1951). In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S.Ct. 2847, 2858, 86 L.Ed.2d 467 (1985), the Supreme Court upheld liability in part because "the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years." *Id.* Thus, Venice Hospital's decision to allow an MPAC salesman access to patients and initially limit the home health care nurses' authority to discuss patients' DME needs was a "decision by a monopolist to make an important change in the character of the market." *Id.* The outcome in *Aspen Skiing* turned on whether the record supported the jury's conclusion that there were no valid business reasons for Ski Co.'s refusal to deal with a competitor. In analyzing the record, the Court noted that Ski Co. was unable to produce "any efficiency justification whatever for its pattern of conduct." *Id.* 105 S.Ct. at 2860. Additionally, the Court found that Ski Co. had engaged in economically irrational behavior by foregoing "short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Id.* at 2861. The district court incorrectly concluded that economically irra-

tional behavior, i.e., behavior which results in lost profits, was a necessary condition to the Court's holding. This demonstrates an unjustifiably narrow view of *Aspen Skiing*. The presence of economically irrational behavior made the record in that case "*comfortably* support[] an inference that the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival." *Id.* (emphasis added). The operative question is whether the hospital can offer any efficiency reason for its behavior. *Id.* at 2860-61. We can find no efficiency justification in the record. We also note that as we above summarized the hospital's refusal to allow other DME vendors access is but one of several identifiable anticompetitive acts which when viewed together support the jury's findings that the defendants' actions have impaired competition in an unnecessarily restrictive way.

Appellees argue that since the joint venture was legitimate, any benefits that Venice Hospital, MPAC and Sammett derive from the integration is likewise legitimate. We think appellees err in leaping to this conclusion. VCA has not challenged the joint venture as such and, therefore, we have assumed the joint venture is legitimate.[6] VCA's complaint relates to the manner in

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[6] In its brief as *amicus curiae*, Voluntary Hospitals of America, Inc. argues that vertical integration is necessary for hospitals to survive in the present day health care industry. This may be the case; however, the health care industry has no blanket immunity from the antitrust laws. *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2, 104 S.Ct. 1551, 1565 n. 42, 80 L.Ed.2d 2 (1984). In *Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 1031, 35 L.Ed.2d 359 (1973), the Court rejected Otter Tail's argument that it needed to exclude possible competitors to survive and concluded that the Sherman "Act assumes that an enterprise will protect itself against loss by operating with superior service, lower costs and improved efficiency." Our decision today does not limit the ability of firms to vertically integrate when that integration does not unnecessarily exclude competition, or is not undertaken to monopolize or restrain trade.

which the defendants implemented the joint venture and to their intent in forming the joint venture. Our discussion here extends no further than the case presented.

B. *Antitrust Injury*

Appellees claim and the district court found that VCA had failed to demonstrate that it had suffered any antitrust injury. The district court observed that "the underlying policy and purpose of the antitrust laws is to protect competition and not competitors." 703 F.Supp. at 1513 (citing *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 110, 107 S.Ct. 484, 489, 93 L.Ed.2d 427 (1986)). The district court's failure to recognize antitrust injury in this case stems from its failure to recognize the defendants' anticompetitive acts as such. As we explained above, defendants engaged in a number of anticompetitive acts which, if causally related to VCA's alleged injury, support a finding of antitrust injury. Recently the Supreme Court reaffirmed its holding in *Cargill* and concluded that "a plaintiff must prove the existence of '*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Atlantic Richfield Co. v. USA Petroleum Co.*, —— U.S. ——,——, 110 S.Ct. 1884, 1889, 109 L.Ed.2d 333 (1990) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 698, 50 L.Ed.2d 701 (1977) (emphasis in original)). In *Atlantic Richfield*, a competitor sought to challenge a vertical maximum price-fixing arrangement. The Supreme Court noted that it is impossible for such a scheme to do injury to the competitor. The danger in price fixing arrangements identified in *Albrecht v. Herald*, 390 U.S. 145, 152-53, 88 S.Ct. 869, 873, 19 L.Ed.2d 998 (1968), is that they tend to stifle a small distributor's ability to compete with a larger distributor because the small distributor may, at the low maximum price, be unable to provide the services demanded in a competitive market. A competitor not bound

by the price ceiling, the Court reasoned, could not be harmed by the price-fixing agreement. Additionally, the court noted that a competitor could not be injured by a conspiracy to fix minimum prices. A competitor can only stand to gain from a conspiracy to raise a market price. *Matsushita Elec. Industrial Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 582-83, 106 S.Ct. 1348, 1353-54, 89 L.Ed.2d 538 (1986).

VCA's claim suffers from none of these infirmities. VCA claims that defendants' practices have unreasonably restricted competition by channeling patient choice to defendants and by excluding all competing DME vendors' access to Venice Hospital's patients. The antitrust laws were intended to prevent unreasonably exclusionary practices. VCA's injury flows directly from that which makes the defendants' acts unlawful. Appellees claim and the district court agreed that VCA failed to show that the patients as the consumers, suffered any injury. As we discussed above, the channeling of patient choice is sufficient to show injury to consumers. The antitrust laws do not require the consumer to suffer some form of monetary damage before a defendant's anticompetitive conduct is actionable. *See Aspen Skiing*, 105 S.Ct. at 2859-60 (consumers injured by not having easy access to all four mountains). *See also Association of General Contractors of Cal. v. California St. Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 903, 74 L.Ed.2d 723 (1983) ("Coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions and may be condemned even without proof of its actual market effect."). Injury to competition may be shown even though injury to the consumer is practically nonexistent. *Cf. Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 1029, 35 L.Ed.2d 359 (1973) (electric utility that dominates transmission of power in most of its service area may not use that "dominance to foreclose potential entrants into the retail area from obtaining electric power from

outside sources of supply"); *Fishman v. Estate of Wirtz*, 807 F.2d 520, 536 (7th Cir.1986) ("The antirust laws are concerned with the competitive *process*, and their application does not depend in each particular case upon the ultimate demonstrable consumer effect.") (emphasis added). We recognize that *Otter Tail Power* was a civil antitrust suit brought by the government and not a private plaintiff. This does not alter the Court's conclusion that Otter Tail's exclusionary practices "foreclose[d] competition." *Id.* This case is significant because in selecting which power company will serve an area, the consumer plays a minor, if not nonexistent, role.

Thus, a court must consider the effect on competition and not simply the effect on the ultimate consumer.[7] In the DME industry, because of the regulated nature of Medicare and Medicaid reimbursements, the primary means of competition is quality and service. The defendants here have knowingly and purposefully set in place a scheme which insulates the unknowing patient from learning of these nuances. Competition has been injured because there is no effective means by which competing DME vendors can reach those patients who require DME when they are discharged from the hospital. The Supreme Court has aptly stated:

> A refusal to compete with respect to the package of services offered to customers, no less than a refusal

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[7] The district court noted that prices have actually gone down and that the market is less concentrated than it was prior to the joint venture. 703 F.Supp. at 1519. Dr. Blair testified that the Herfendall-Hirschman Index—a measure of market concentration—dropped from 5708 when VCA's market share was at its peak to 4780 now. Appellees argue that this shows the joint venture has had a procompetitive effect on the market. The Department of Justice Merger Guidelines use this methodology to evaluate whether a merger will result in impermissible market concentration. *See* A. Stickells, *Federal Control of Business*, 1989 Cumulative Supplement, Appendix A at 627 (1989). The Department considers a market with an Index over 1800 to be highly concentrated. *Id.*

> to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare. . . .Absent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services—such an agreement *limiting consumer choice by limiting the "ordinary give and take of the market place,"* cannot be sustained. . . .

Federal Trade Commission v. Indiana Federation of Dentists, 476 U.S. 447, 106 S.Ct. 2009, 2018, 90 L.Ed.2d 445 (1986) (federation of dentists refused to forward certain information (X-rays) to their patients' insurance companies) (emphasis added). The Court then stated that "even if the desired information were in fact completely useless to the insurers and their patients in making an informed choice . . . the Federation would still not be justified in deciding on behalf of its members' customers that they did not need the information." *Id.* 106 S.Ct. at 2020. Elsewhere the Court has stated "even if the customer is indifferent among brands of the second product and therefore loses nothing by agreeing to use the seller's brand of the second in order to get his brand of the first, such tying agreement may work significant restraints on competition in the tied product." *Jefferson Parish Hosp. v. Hyde,* 466 U.S. 2, 104 S.Ct. 1551, 1558 n. 19, 80 L.Ed.2d 2 (1984). Finally, we note that in *Association of General Contractors,* the Supreme Court concluded that the Union did not suffer antitrust injury because "the Union was neither a consumer nor a competitor in the market in which trade was restrained." 103 S.Ct. at 909. The Court expressed some doubt as to whether the Union's goal was robust competition. *Id.* In the instant case, the plaintiff is a competitor in the market in which trade was restrained and VCA's injury is "inextricably intertwined" with the injury which the conspirators imposed on the DME consumers. *Blue Shield of Virginia v. McCready,* 457 U.S. 465, 484, 102 S. Ct. 2540,

2551, 73 L.Ed.2d 149 (1982). We have no difficulty concluding as did the jury that VCA suffered an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." —— U.S. at ——, 110 S.Ct. at 1889. We now turn to VCA's claims under Sections 1 and 2 of the Sherman Act and under state law for tortious interference with VCA's business relations.

C. *Section 1 Conspiracy*

VCA argues that the jury verdict on its Section 1 claim was proper because it presented substantial evidence in support of its contention that the defendants entered into a reciprocal agreement with one or more of the home health agencies whereby the home health care nurses would continue to have access to patients prior to discharge in exchange for the nurses preferentially referring their patients to MPAC. The district court analyzed this reciprocal agreement as a tying case and concluded that VCA had failed to prove that Venice Hospital's condition for continued access to the hospital "reached the level of a mandatory requirement." 703 F.Supp. at 1517. The court relied on *Bob Maxfield, Inc. v. American Motors Corp.*, 637 F.2d 1033 (5th Cir.), *cert. denied*, 454 U.S. 860, 102 S.Ct. 315, 70 L.Ed.2d 158 (1981), a former Fifth Circuit tying case and held "that defendant's behavior, as a matter of law, was not unlawfully coercive." *Id.* While reciprocal dealing as an antitrust violation has significant conceptual similarity to tying, we conclude that the district court erred by applying the strict tying standard for coercion to this reciprocal dealing case.

Reciprocal dealing has received little attention in the courts; however, when the subject has arisen, courts have not hesitated to condemn the practice. In a tying arrangement, a seller uses its power in the market for product A to coerce the buyer of product A to purchase product B. But "[a] reciprocal dealing arrangement exists when the two parties face each other as both buyer and seller."

Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419, 424 (5th Cir.1978). The buyer of product A offers to buy from the other party, but only if that second party will buy product B from the first party. A typical example is where a producer of aluminum ingot sells to a manufacturer who uses the ingot to manufacture equipment used to produce the ingot. *See* L. Sullivan, *Antitrust* § 170 at 490 (1977). In *Spartan Mills*, the court noted that reciprocal dealing cases were similar to tying cases since "[i]n each case one side of a transaction has special power in the market place," and observed that "[i]n reciprocal dealings a buyer with economic power forces a seller to buy something from it to sell its goods." 581 F.2d at 425. It is clear that such coercive conduct is sufficient to run afoul of the Sherman Act; however, it is equally clear that "[r]eciprocal trading may ensure not from bludgeoning or coercion but from more subtle arrangements. A threatened withdrawal of orders if products of an affiliate cease being bought, as well as a conditioning of future purchases on the receipt of orders for products of that affiliate is an anti-competitive practice." *Federal Trade Commission v. Consolidated Foods Corp.*, 380 U.S. 592, 85 S.Ct. 1220, 1222, 14 L.Ed.2d 95 (1965) (concerning potential for reciprocal dealing as basis to challenge merger). In the context of an alleged tying claim, the Supreme Court has stated:

> This type of market power has sometimes been referred to as "leverage." Professors Areeda and Turner provide a definition that suits present purposes. "Leverage is loosely defined here as a supplier's power to *induce* his customer for one product to buy a second product from him that would not otherwise be purchased solely on the merit of that second product." 5 P. Areeda & D. Turner, Antitrust Law ¶ 1134a, p. 202 (1980).

Jefferson Parish Hosp. v. Hyde, 466 U.S. 2, 104 S.Ct. 1551, 1559 n. 20, 80 L.Ed.2d 2 (1984) (emphasis

added). The word "induce" clearly contemplates conduct short of an absolute command. The commentators take this a step further. One has concluded that, "[w]e ought to have no compunction about inhibiting a firm from buying from a customer if it does so not because it regards the customer's offering as best, but because it sees this transaction as a way to bind the customer to it as a customer." L. Sullivan, *supra* at 494. Sullivan observes:

> it may in some cases be possible to identify reciprocity as the motive for a transaction with considerable assurance . . . and if [a] firm then begins systematically switching its purchases from sellers who could not also be buyers from it to firms which could, we ought not to hesitate to label the purchases as being made from a reciprocal motive.

Id. at 494-95. *See Betaseed, Inc. v. U and I, Inc.*, 681 F.2d 1203, 1216-17 (9th Cir.1982) (applying per se rule to coercive reciprocity, but recognizing that "[t]he spectrum of the practice . . . extends from the use of overt coercion to the use of a mutual patronage arrangement"); *United States v. General Dynamics Corp.*, 258 F.Supp. 36, 57 (S.D.N.Y.1966) (reciprocity, whether mutual or coercive, serves to exclude competitors).

In the instant case VCA has relied on a theory of coercive reciprocity to support its Section 1 conspiracy claim. The arrangement in this case does not fit precisely the contours of either a classic tying or a reciprocal arrangement; however, the court instructed the jury on the basis of VCA's reciprocal dealing claim and no party objected. Since we find that the arrangement between defendants and the home health agencies has sufficient elements of a reciprocal arrangement, we analyze the evidence VCA presented to support its claim under the law governing such arrangements. Additionally, we do not think it necessary to divide reciprocity cases into two categories; i.e., coercive and mutual. An antitrust plaintiff may succeed on a claim of coerced reciprocity even

if the coercion involved in the case does not rise to the level required for per se treatment. *See Spartan Grain*, 581 F.2d at 425; *Betaseed*, 681 F.2d at 1217. If the element of coercion necessary for per se treatment is not present, a court will analyze the case under the rule of reason. 581 F.2d at 425 n. 6. Therefore, we conclude that where a plaintiff's evidence shows that one party has sufficient market power to unduly influence a second party to treat the first more favorably than the free market would otherwise dictate, and the second party acts in conformity with the reciprocal arrangement, the plaintiff has proved the existence of an arrangement which unreasonably restrains trade. *Cf. Spartan Grain & Mill Co. v. Ayers*, 735 F.2d 1284, 1288 (11th Cir.1984) (appeal after remand) (jury must find that defendant had an economic advantage in the tying product market which could be used to induce or coerce the victim to accept the tied product). Heightened scrutiny is justified in the instant case since we are confronted with a conspiracy.

> Section 1 of the Sherman Act, in contrast, reaches unreasonable restraints of trade. . . . Concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2. . . . Whatever form the inquiry takes, however, it is not necessary to prove that concerted activity threatens monopolization.
>
> The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anti-competitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. . . . Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anti-competitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S.Ct. 2731, 2740, 81 L.Ed.2d 628 (1984). To

recover on its Section 1 claim, a plaintiff must also show that it suffered an antitrust injury which is causally related to the challenged conduct. This aspect has already been addressed.

The district court concluded that the home health care nurses lost none of their autonomy ot selecte any DME supplier. 703 F.Supp. at 1517. We disagree and have no difficulty concluding that VCA presented sufficient evidence to support the jury's finding that a reciprocal arrangement existed between those defendants checked on the interrogatory and at least one home health care agency. While only one of the home health care nurses admitted she felt leveraged, several others stated that they thought it best to cooperate. All nurses who testified stated that they were aware that the hospital was considering an exclusive arrangement with one of the home health agencies. The testimony of all the home health care nurses indicated that VCA was superior to MPAC in quality and service and that they recommended VCA to most of their patients. VCA's superiority did not change, yet the nurses started recommending MPAC in lieu of VCA. Plaintiff placed in evidence a memo from a former senior vice president of the hospital to the social services director instructing her to "refer all patients to these hospital affiliated organizations unless the attending physician specifically refers the patient to a different supplier." Following the joint venture, the hospital initially instituted a policy which substantially curtailed the nurses' opportunity to discuss with a patient his or her DME needs; i.e., perform a DME assessment. However, after several of the nurses complained, the nurses were again allowed to perform a patient's assessment. The plaintiffs presented uncontroverted evidence that VCA's business started to decline immediately after the joint venture went into effect. It bears noting that MPAC had been in the Venice market for some time prior to that, during which time VCA suffered no appreciable change in market share.

While no individual piece of the evidence presented may be sufficient to support the jury's finding, when viewed as a whole the evidence reasonably supports the inference that because of a possible threat to their job security and in response to the hospital's solicitations, the home health care nurses preferentially recommended MPAC over other competing DME vendors. That the nurses did not testify that they were coerced is not essential to VCA's claim, nor is it surprising as many of these nurses must have access to the hospital to survive. We do not here attempt to guess what the jury may have relied upon to reach its decision, we merely note that the element of coercion which the district court found so lacking in this case may have been apparent to the jury. Contrary to the district court, we find supportive of the jury's finding a reciprocal arrangement that the home health care nurses were in part motivated by their own self interest.

In its opinion, the district court did not discuss the jury's finding that defendants Venice Hospital, MPAC and the Sammett Corporation were participants in the conspiracy; however, since appellees here contend that the evidence was insufficient on this element, we will address their concern. We are aware of the Supreme Court's recent admonition that the plaintiff must show that the conspiracy is "economically reasonable" and must present evidence which "tends to exclude the possibility that the manufacturer and nonterminated distributor[] [were] acting independently." *Matsushita Elec. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *Delong Equip. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1508 (11th Cir.1989). We conclude that the evidence of each defendant's participation in the conspiracy meets that test and is sufficient to support the jury's verdict. The actions taken by the conspirators was to their mutual benefit. Direct evidence of each defendant's knowing participation is not required, instead it may be established through proof of surround-

ing circumstances. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 252-54, 60 S.Ct. 811, 858, 84 L.Ed. 1129 (1940); *Bolt v. Halifax Hosp. Medical Center*, 891 F.2d 810 (11th Cir.1990). Additionally, a conspiracy need not be express or formally agreed upon. *Halifax Hosp.*, 891 F.2d at 810; *Gainesville Utilities v. Florida Power & Light*, 573 F.2d 292, 301 (5th Cir.1978). The result in *Gainesville Utilities* was supported by the finding that "concerted action was contemplated and invited." 573 F.2d at 301 (quoting *Interstate Circuit v. United States*, 306 U.S. 208, 226, 59 S.Ct. 467, 474, 83 L.Ed. 610 (1939)).

The hospital made it known to the home health care nurses that they were to recommend MPAC. The hospital was responsible for creating a climate where the nurses felt it necessary "because of the political climate" to ingratiate themselves to the hospital. The hospital invited concerted action and the home health care nurses cooperated. The hospital, predictably, graciously accepted the nurses' cooperation. MPAC was involved through the participation of its agent Bowers who was positioned to receive the orders from the patients or nurses which in the absence of the reciprocal arrangement would have been placed in a competitive market. He was aware of the hospital's policies regarding the home health care nurses and of the change in policy which allowed him, a representative and employee of MPAC, to solicit business in the hospital when no other DME representative was allowed such access. The Sammett Corporation entered this arrangement intent on eliminating competition. The trial court instructed the jury on the requirements for a finding of knowing participation in a conspiracy. In closing argument, attorneys for MPAC and Sammett argued that the plaintiffs had failed to prove knowing participation in a conspiracy with the home health care nurses. Nevertheless, the jury found that the above named defendants participated in the conspiracy with the nurses and each other.

It is axiomatic that members of a conspiracy need not be aware of, or consent to each act committed in furtherance of the conspiracy to be held liable as a co-conspirator. *United States v. Walker*, 720 F.2d 1527, 1538-39 (11th Cir.1983) (evidence sufficient to support conviction for conspiracy to distribute narcotics). *See Socony-Vacuum*, 310 U.S. at 253-54, 60 S.Ct. at 858 ("an overt act of one partner may be the overt act of all without any new agreement specifically directed to that act"). The evidence recited in preceding paragraphs is but a part of the anti-competitive conduct in which these defendants engaged. We have already discussed other anticompetitive acts, *supra*. Appellees would have this court analyze each of VCA's claims as if they were completely separate lawsuits. Their suggested approach would be improper. When analyzing the evidence as to whether it supports a finding of conspiracy, the Supreme Court has stated:

> [P]laintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. ". . . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. . . . [A]nd in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it."

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S.Ct. 1404, 1410, 8 L.Ed.2d 777 (1962) (quoting *American Tobacco Co. v. United States*, 147 F.2d 93, 106 (6th Cir.1944)) (citations omitted).[8]

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[8] The hospital argues that it simply asked the home health care nurses to use its affiliated DME vendor and that its conduct is no different from any competitor hawking its product. During the argument on its motion for a directed verdict, appellees' counsel rhetorically asked "what was the hospital supposed to do?" Coun-

We conclude that VCA has presented sufficient substantial evidence to support the jury's finding that the defendants and at least one home health agency entered into a reciprocal agreement which had the effect of excluding VCA from having access to patients discharged from Venice Hospital.

D. *Section 2 Conspiracy*

Conspiracy to monopolize under Section 2 is somewhat different from its Section 1 counterpart and requires: (1) concerted action by knowing participants who have specific intent to achieve a monopoly; and (2) "the commission of at least some overt act in furtherance of the conspiracy." L. Sullivan, *supra*, § 49, at 132. Unlike attempt to monopolize under Section 2, a plaintiff alleging a conspiracy to monopolize need not prove that the conspiracy has a dangerous probability of success. *International Distribution Centers, Inc. v. Walsh Trucking*, 812 F.2d 786, 795-96 & n. 8 (2nd Cir.1987). *See* 3 Von Kalinowski, *Antitrust Laws and Trade Regulations* § 9.02 [1] at 9-35, (1986). *Cf. American Tobbaco Co. v. United States*, 328 U.S. 781, 789, 66 S.Ct. 1125, 1129, 90 L.Ed. 1575 (1946) (conviction for conspiracy to monopolize may stand even if conspirators had not "acquired the power to carry out the object of the conspiracy").

In *Matsushita*, the Supreme Court emphasized that "conduct as consistent with permissible competition as with illlegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." 106 S.Ct. at 1356. The Court also reaffirmed that "courts should not permit factfinders to infer conspiracies when such inferences are implausible." 106 S.Ct. at 1359. In *Matsushita*, the

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sel questioned whether the hospital was supposed to encourage the home health care nurses to use competing DME vendors. We have set out in this opinion the conduct which may be described as anti-competitive. The list includes much more than the simple hawking of wares.

plaintiffs had alleged a conspiracy to engage in predatory pricing; however, the plaintiffs also alleged that the predation period was to have extended over a period of twenty years. *Id.* Predatory pricing typically involves pricing below some measure of cost which the competition cannot meet for a period of time until the competition is driven out of business. Once the competition is gone, the surviving firm can charge supercompetitive prices, recoup its short term losses and reap monopoly profits. *Id.* at 1357-59. The Court observed that a conspiracy to engage in predatory pricing is unlikely because of problems in coordination and policing. The Court concluded that it was simply implausible that the firms would sustain losses for two decades in the hope that they may at some future time recoup their losses and reap monopoly profits. *Id.*

In the instant case, the jury found that Venice Hospital, MPAC and Sammett had specific intent to monopolize the DME market in the Venice area. Unlike the scheme in *Matsushita,* the conspiracy alleged here is most plausible. In its simplest form, the defendants have conspired to monopolize the DME market by adopting policies which exclude competing DME vendors, by unduly influencing the home health care nurses to preferentially recommend MPAC over competing DME vendors, and by using the hosiptal's market power in the acute care market to gain an unfair advantage in the DME market. Conspirators are unlikely to broadcast their unlawful intent; thus, specific intent to monopolize must often be inferred from a defendant's acts. L. Sullivan, *supra,* § 51 at 135. In the instant case, we conclude that the defendants' acts when viewed as a whole support an inference that the defendants had specific intent to monopolize. The jury's finding that defendants engaged in a conspiracy to monopolize was supported by substantial evidence.

E. *Attempt to Monopolize*

To succeed on its claim that MPAC attempted to monopolize the DME market, VCA's evidence must show that (1) MPAC had specific intent to monopolize the DME market and (2) MPAC had a dangerous probability of success. *Lorain Journal Co. v. United States*, 342 U.S. 143, 72 S.Ct. 181, 186, 96 L.Ed. 162 (1951); *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 850-51 (5th Cir.1975). Dangerous probability has not always been a separate and distinct element of an attempt to monopolize claim. *See American Tobacco Co. v. United States*, 328 U.S. 781, 785, 66 S.Ct. 1125, 1127, 90 L.Ed. 1575 (1946); *Swift & Co. v. United States*, 196 U.S. 375, 396, 25 S.Ct. 276, 279, 49 L.Ed. 518 (1905). However, dangerous probability has come to serve as a sort of protective feature which shields what may be only intensely competitive conduct from liability under the antitrust laws. Handler, *Reforming the Antitrust Laws*, 82 Colum.L.Rev. 1287, 1352-53 (1982). A dangerous probability of success might be found when the defendant's market strength approaches monopoly power. Other factors to consider are the relative strength of the defendant's competitors and whether significant barriers to entry exist. *White & White, Inc. v. American Hosp. Supply Corp.*, 723 F.2d 495, 506-07 (6th Cir.1983).

Dangerous probability of success is the only primary element necessary to this claim which we have not previously discussed. The judge instructed the jury that "[a] dangerous probability of success need not mean the success was nearly certain. It means that the chance of success was substantial and real. That is, that there was a reasonable likelihood that the defendant MPAC would ultimately achieve its goal of monopoly power." As noted above, the relevant market and defendant's market share are inter-related to whether the defendant has a dangerous probability of success. To support an attempt to monopolize claim, a plaintiff must present evidence of the

relevant product and geographic markets and evidence which shows that the defendant's conduct had an anti-competitive effect in those markets. *American Key Corp. v. Cole Nat. Corp.*, 762 F.2d 1569, 1579 (11th Cir. 1985). The plaintiff's expert witness Dr. Blair testified extensively as to the relevant geographic and product markets and as to the defendant's share of the DME referrals from Venice Hospital and from the rest of the relevant market. The defendant's expert also testified at length and offered his version of the market definitions and market shares which differed from plaintiff's expert. The district court did not disturb the jury's explicit and implicit findings as to product and geographic markets and as to market shares. Defendant asserts that Dr. Blair's version is incorrect and cites only its expert's testimony to support its position; MPAC, however, offered no substantive basis for the claim that their expert's testimony was more trustworthy. The jury was correctly instructed on the use of expert testimony and was free to accept or reject any or all of either expert's testimony. Apparently they found Dr. Blair's testimony more convincing.

Dr. Blair's testimony supports a finding that MPAC captured 39% of the total area DME market simply by capturing a large percentage of Venice Hospital's referrals. His testimony also supports a finding that Venice Hospital represents at least 46% of the total DME market in the Venice area. The evidence also showed that over a two-year period, starting just before the joint venture went into effect, MPAC's total area market share rose from 9.2% to 61%. Plainitff also presented evidence that shows that the challenged practices have had an adverse effect on other competitors in the market; one other DME vendor has gone out of business and another's demise appears imminent. The remaining competitors are small in comparison to VCA which in 1987 retained 30% of the market. In a section on vertical mergers, Professor Sullivan has identified another factor we think relevant in this

case. He refers to it as the "need for integrated entry." L. Sullivan, *supra*, § 210 at 659. Generally, it involves the notion that the linking of two firms at different levels in the market may reduce the likelihood of independent entry at either level. The instant case provides an excellent example. Venice Hospital and MPAC are currently linked. MPAC has practically guaranteed itself half the DME market in Venice area simply by capturing Venice Hospital's referrals. Any DME vendor contemplating whether to open a business in the Venice area will have difficulty competing with MPAC because MPAC is linked to the largest DME source in the market. This creates circumstances where it is necessary for a new competitor who wishes to enter the market, to be similarly integrated; that is, it must also have a large guaranteed referral source. Notably, one Sarasota DME vendor who attempted to break into the Venice DME market testified that he could not get a toehold in Venice because MPAC had locked up the market by affiliating with the hospital. The evidence recited above is sufficient to support the jury's finding that MPAC attempted to monopolize the Venice DME market because it demonstrates defendant's intent to monopolize and that it had a dangerous probability of success.

F. *Monopoly Leveraging as an Attempt to Monopolize*

In its simplest form, a firm is guilty of monopoly leveraging if it uses market power in one market to gain market share in another market other than by competitive means. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir.1979) ("the use of monopoly power attained in one market to gain a competitive advantage in another is a violation of § 2, even if there has not been an attempt to monopolize the second market"). This doctrine is limited by the view that "a large firm does not violate § 2 simply by reaping the competitive rewards attributable to its efficient size, nor does an integrated business offend the Sherman Act whenever one of

its departments benefits from association with a division possessing a monopoly in its own market." *Id.*

This theory has been embraced by the Sixth Circuit in *Kerasotes Mich. Theatres v. National Amusements,* 854 F.2d 135, 136-37 (6th Cir. 1988), and specifically reaffirmed by the Second Circuit in *Grand-Light & Supply Co. v. Honeywell, Inc.,* 771 F.2d 672, 681 (2d Cir. 1985). Both the D.C. Circuit and the Ninth Circuit have expressly reserved judgment for a case that squarely raises the issue. *See Catlin v. Washington Energy Co.,* 791 F.2d 1343, 1346 (9th Cir.1986); *Association for Intercollegiate Athletics for Women v. NCAA,* 735 F.2d 577, 586 n. 14 (D.C.Cir. 1984). In *Grandlight,* the court summarized the requirements for liability as follows: "monopoly power in one market; the use of that power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor in another distinct market; and injury caused by the challenged conduct." 771 F.2d at 681 (citations and quotations omitted). The Sixth Circuit has concluded that

> while the alleged agreement between [defendant] and its film distributors is vertical, the effect is exclusively horizontal. The sole purpose for such an agreement is to extend a business' dominance from one market into a second market, without having to achieve that dominance in the second market by developing a superior product or as the result of other legitimate competitive advantages.

Kerasotes, 854 F.2d at 137.

There exist plausible business reasons for the hospital's desire to enter the DME market and the jury might have concluded that Venice Hospital and MPAC are simply reaping the rewards of integration. The jury, however, concluded otherwise. When we scrutinize the hospital's means of implementation in light of all the circumstances present in this case, we have no difficulty concluding

Venice Hospital purposefully abused its monopoly power in the acute care market to exclude MPAC's competitors from a significant and perhaps essential segment of the DME market in the Venice area.

Appellees contend that monopoly leveraging is not a separate offense under Section 2. While we harbour some reservation about the Second Circuit's conclusion that no attempt to monopolize the leveraged market need be proved, that aspect of the monopoly leveraging theory is not problematic in this case. The judge charged the jury in part as follows:

> In order to win on this claim the plaintiff must have proved each of the following elements by a preponderance of the evidence.
>
> First, that the defendant Venice Hospital had monopoly power in the primary hospital services market as alleged. Second, that the defendant Venice Hospital willfully used that power to forclose competition, gain a competitive advantage or destroy a competitor in a different market. And third, that plaintiff was injured in its business or property because of defendant's conduct.

In explaining the means by which plaintiff could prove "willful" use of monopoly power the judge stated that plaintiff

> may do so by showing that the defendant Venice Hospital's conscious objective was to use its monopoly power in primary hospital services to obtain an unlawful competitive advantage or to injure its competitors and competition in the Durable Medical Equipment market.
>
> Second, it may do so by showing that the unlawful competitive advantage or injury to competitors in the Durable Medical Equipment market was the necessary and direct consequence of defendant Venice Hospital's conduct or business arrangements.

In effect, the jury was charged on attempted monopolization. *See Catlin*, 791 F.2d at 1349. The only element arguably missing from this charge is the requisite specific intent to monopolize required under traditional Section 2 attempt claims. We need not now decide whether this would be fatal to plaintiff's monopoly leveraging claim since under the count for conspiracy to monopolize, the jury found that Venice Hospital had specific intent to monopolize the DME market. All the other elements of an attempt to monopolize under Section 2 are present in this case. The key to distinguishing unlawful monopoly leveraging from lawful competitive advantage available as a result of integration is intent. There is ample evidence —other than the mere fact that Venice Hospital through the joint venture expanded into a related field—which shows that this tack was taken with the unlawful intent to monopolize the DME market. In a different context, nevertheless applicable here, the Supreme Court held that "[i]n the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right" of a party to deal with whomever he chooses. *Lorain Journal*, 72 S.Ct. at 187. The Court observed that "[t]he right claimed by the publisher is neither absolute nor exempt from regulation. Its exercise as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act." *Id.* So it is here. Generally speaking a party with a lawful monopoly may reap the benefits of its size and an integrated firm may reap the benefits of that integration. However, when a party with monopoly power abuses its monopoly power in one market as a means of gaining an unlawful competitive advantage in and monopolizing another market, we have no hesitation to conclude that the Sherman Act prohibits such conduct. *See Otter Tail Power*, 93 S.Ct. at 1029 ("Use of monopoly power to destroy threatened competition is a violation of the attempt to monopolize clause of § 2 of the Sherman Act."). We conclude therefore that there is ample evidence which supports the jury's finding that

Venice Hospital engaged in unlawful monopoly leveraging.

III. TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS:

The jury found that defendants MPAC and Venice Hospital tortiously interfered with VCA's business relationship with the home health care nurses. The Supreme Court of Florida has stated that to succeed on a tortious interference claim, a plaintiff must show four elements:

> (1) the existence of a business relationship, not necessarily evidenced by an enforceable contract; (2) knowledge of the relationship on the part of the defendant; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of the breach of the relationship.

Tamiami Trail Tours, Inc. v. Cotton, 463 So.2d 1126, 1127 (Fla.1985). The judge's charge to the jury satisfies these elements and appellees do not contest the charge. The district court rejected the jury's finding solely on the ground that the evidence did not support a finding under the third element, i.e., that the defendants' conduct was not unjustified. Having found above that the defendants' conduct violated the antitrust laws, we have no difficulty concluding that the defendants' conduct was also unjustified. Appellees argue that the evidence does not support the jury's finding that the interference was intentional because the defendants did not know the home health care nurses were predominantly recommending VCA. We find this argument meritless. Nothing in our review of the Florida cases indicates that the defendant needed to know specifically who its acts would injure. In fact, the Florida Standard Jury Instruction for this tort states in part that "[i]nterference is intentional if the person interfering . . . knows that the interference is substantially certain to oc-

cur as a result of his action." *McCurdy v. Collis*, 508 So.2d 380, 383 n. 2 (Fla.App. 1 Dist.1987). The defendants were well aware of the relationships between the home health care nurses and the competing DME vendors. It was because of those relationships which sent business to MPAC's competitors that the defendants sought to unduly influence the nurses preferentially to recommend MPAC. We conclude that the evidence supports the jury's finding that the named defendants tortiously interfered with VCA's business relations.

CONCLUSION

For the foregoing reasons, the decision of the district court is REVERSED, the case is REMANDED to the district court with directions to reinstate the jury verdict on special interrogatories I, III, IV, V and VI.

APPENDIX C

UNITED STATES DISTRICT COURT
M.D. FLORIDA
TAMPA DIVISION

No. 85-1074-Civ-T-15

KEY ENTERPRISES OF DELAWARE, INC.,
Plaintiff,

v.

VENICE HOSPITAL, *et al.*,
Defendants.

Jan. 19, 1989

MEMORANDUM DECISION AND ORDER

CASTAGNA, District Judge.

The Court has for adjudication the defendants Venice Hospital, The Sammett Corporation (Sammett) and Medicare Patient Aid Centers' (MPAC)[1] motion for judgment notwithstanding the verdict, or for new trial, or for remittitur and the plaintiff's response. The defendants attack a jury verdict which found that they violated § 1 and § 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and tortiously interfered with a business relationship of the plaintiffs in violation of Florida state law.

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[1] These defendants will be collectively referred to as "the defendants."

I. Factual Background

This case concerns the marketing of durable medical equipment (DME) to home users in the Venice, Florida area. DME includes prosthetic devices, hospital beds, oxygen equipment, wheelchairs, walkers and soft goods such as ostomy supplies, and dressings. DME suppliers rent and sell their products, and receive customers from many sources, including self-selection, referrals from hospitals, nursing homes and intermediate care facilities, home health agencies, physicians and physical therapists. The plaintiff, Venice Convalescent Aids Medical Supply (VCA), is one of several competing retailers of DME to non-institutionalized patients in the Venice, Florida area. The defendant MPAC is also a DME supplier and is jointly owned by the other two defendants, Venice hospital, a Florida non-profit corporation, and the Sammett Corporation.

In May 1984, the defendant Sammett established the defendant MPAC to provide DME equipment to the Venice, Florida DME market. Also at this time, Venice hospital began investigating the possibility of establishing a home medical and supply business. Venice hospital contacted several pre-existing DME suppliers, including MPAC, regarding a possible joint venture.[2] Ultimately, in April 1985, a subsidiary of Venice hospital, Gulf Area Diversified Services (GADS), purchased from Sammett a one-half interest in Sammett's MPAC facility in Venice and thus established MPAC as a joint venture between Sammett and Venice hospital (the joint venture or, interchangeably, MPAC).

Before the joint venture, it was common practice in the Venice DME market for home health nurses to choose the

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[2] Although the plaintiff had not been contacted by the Venice hospital, VCA contacted the hospital and inquired into the possibility of a joint venture. The hospital declined, noting that it had already entered into a joint venture with MPAC.

DME vendor who would supply patients discharged from Venice hospital with their DME needs. The home health nurses had training in DME usage and were considered capable in selecting DME equipment for patients. The plaintiff concentrated its sales efforts on the home health nurses and consequently received most of its DME business from home health agencies and relatively little business from the other available sources.

After the joint venture was created, Venice hospital instituted a new policy encouraging home health nurses to select MPAC as their DME supplier. This policy was instituted by the hospital and implemented through Mark Bowers, a MPAC employee. Bowers became the patient equipment coordinator in the Venice hospital's discharge planning department and his duties included meeting with many of the patients with anticipated needs for DME and organizing home treatment for patients. If a patient, home health nurse or physician made a request for a particular DME vendor in a particular case, Bowers would honor that choice. However, in the absence of such a choice, Bowers referred all DME business to MPAC.

Plaintiffs contend that the creation of the joint venture and the attendant policy initiated by the defendants to refer all business to MPAC violate the antitrust laws. In their complaint, the plaintiffs alleged, among other things, that the defendants Sammett, Venice hospital, and MPAC violated § 1 and § 2 of the Sherman Act by coercing the home health agencies to refer all their patients to MPAC and by unreasonably restricting and excluding competition in the Venice DME market. The plaintiffs also alleged that the defendants had tortiously interfered with plaintiff's business relationship with the home health agencies.

After a three week trial, the jury, in answers to special interrogatories, found that (i) the defendants had violated § 1 of the Sherman Act by conspiring to deal exclusively

with at least one home health agency (ii) that defendants violated § 2 of the Sherman Act by attempting to, and successfully, monopolizing the DME market in the Venice area (iii) that the defendants violated § 2 by conspiring to monopolize the Venice DME market (iv) that Venice Hospital violated § 2 by using its monopoly power to gain an unfair advantage in the DME market in Venice and (v) that the defendants tortiously interfered with plaintiff's business relationship with the home health agencies. The jury awarded the plaintiffs $760,983.00 in damages, which was duly trebled on the antitrust counts to $2,282,-949.00. The defendants now ask the Court for a judgment notwithstanding the verdict, for a new trial or for remittitur.

II. Federal Antitrust Claims

Plaintiffs bring their federal antitrust claims under § 1 and § 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.[3] The Court will consider plaintiffs' § 1 and § 2 claims collectively, however, since § 1 and § 2 forbid essentially the same conduct, except that § 1 "covers contracts, combinations, or conspiracies" while § 2 "is not restricted to conspiracies or combinations," but also prohibits monopolization and attempts to monopolize. *United States v. Griffith*, 334 U.S. 100, 106-07, 68 S.Ct. 941, 945-46, 92 L.Ed. 1236 (1948); *see also Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 n. 13, 104 S.Ct. 2731, 2739 n. 13, 81 L.Ed.2d 628 (1983). "[T]hose things which are condemned by § 2 are in large measure merely the end products of conduct which violates § 1." *Id. citing Standard Oil Co. v. United States*, 221 U.S. 1,

[3] Section 1 of the Sherman Act declares illegal "[e]very contract, combination . . . or conspiracy, in the restraint of trade or commerce among the several States. . . ." 15 U.S.C. § 1 Similarly, § 2 outlaws any activity by any "person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several States. . . ." 15 U.S.C. § 2.

61, 31 S.Ct. 502, 516, 55 L.Ed. 619 (1911). Moreover, this is a particularly appropriate case to consider the federal antitrust claims as a group since the coercive behavior underlying the § 1 claim is precisely the same restrictive or exclusionary behavior which constitutes the § 2 violations.

Antitrust liability under both § 1 and § 2 requires a finding that the defendants or some of them engaged in unreasonably restrictive, exclusionary or coercive conduct toward the marketplace which caused injury to competition.[4] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600-02, 105 S.Ct. 2847, 2856-57, 86 L.Ed. 2d 467 (1984) (Section 2); *United States v. Topco Associates, Inc.*, 405 U.S. 596, 606-07, 92 S.Ct. 1126, 1133, 31 L.Ed.2d 515 (1972) (Section 1); *United States v. Aluminum Co.*, 148 F.2d 416, 429-30 (2d Cir.1945) (Section 1); *Standard Oil v. United States*, 221 U.S. 1, 55-64, 31 S.Ct. 502, 513-517, 55 L.Ed. 619 (1911) (Section 1); *Mid-Texas Communication v. AT & T*, 615 F.2d 1372, 1387 (5th Cir.1980) (Section 2); *see generally* 3 P. Areeda & D. Turner, *Antitrust Law*, § 825 (1978); 6 P. Areeda & D. Turner, *Antitrust Law*, § 1400c (1978).

The plaintiffs' claim of coercive or unreasonably restrictive or exclusionary conduct rests on the inferences that may be drawn from the following evidence: (1) Venice hospital entered the DME business by purchasing a ½ interest in MPAC; (2) thereafter, the hospital requested the home health nurses to use MPAC as their DME supplier; (3) MPAC, and derivatively Sammett,

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[4] Of course, under § 1 (as opposed to § 2), it is not necessary to show that the concerted activity threatens monopolization. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. at 758, 104 S.Ct. at 2735. Nonetheless, there must be some unreasonable anticompetitive, exclusionary or coercive type conduct (i.e. some restraint of trade) present before a § 1 violation may be found. *Standard Oil v. United States*, 221 U.S. at 55-64, 31 S.Ct. at 513-517 (1911).

helped implement the policy encouraging the home health nurses to refer their DME patients to MPAC; (4) the home health nurse coordinators were guests in the hospital; (5) Bowers, an MPAC employee, was physically present in the hospital to implement the policy; (6) some home health nurses felt subjectively pressured to use MPAC; and (7) some, but not all, home health agencies decided to adhere to the hospital's policy. The issue for resolution is whether this evidence, and the inferences reasonably drawn therefrom, is sufficient as a matter of law to support a finding of prohibited antitrust behavior. The Court concludes that it is not.

Illustrative is *Bob Maxfield, Inc. v. American Motors Corp.*, 637 F.2d 1033 (5th Cir.1981) *cert. denied*, 454 U.S. 860, 102 S.Ct. 315, 70 L.Ed.2d 158 (1981). In *Maxfield*, an automobile dealer brought a Sherman Act claim against an automobile manufacturer alleging that he was coerced by the manufacturer to accept unwanted big cars in order to obtain more desirable small cars. *Id.* at 1035-36. The trial court directed a verdict for defendants on the coercion claims and the fifth circuit affirmed. The appellate court found that coercion could not be established as a matter of law unless it was shown that the defendant *required* the plaintiff to take the large cars or face a cut-off of the small cars. *Id.* at 1037. The court noted that it was permissible for the defendant to vigorously persuade or encourage the plaintiff to accept the big cars without violating the antitrust laws as long as the encouragement fell short of an enforceable requirement. Important to the court's conclusion was: (1) there was no evidence that the defendant actually threatened the plaintiff with the explicit requirement; (2) at all times the plaintiff could and did resist the encouragement and did not lose its autonomy to act; and (3) the requirement was never actively enforced. *Id.* at 1037-38.

Maxfield is substantially similar to the facts presented in this case and indicates that defendants behavior, as a

matter of law, was not unlawfully coercive. First, here as in *Maxfield*, there was no evidence that the defendants *required* the home health nurses to refer to MPAC or face a cut-off in patient referral from the hospital. Plaintiffs did offer testimony that the defendants forthrightly encouraged the nurses to refer to MPAC, but never was it shown, nor argued, that this encouragement reached the level of a mandatory requirement. And without evidence of a mandatory requirement, *Maxfield* dictates that the inference of antitrust coercion is impermissible as a matter of law.

Second; and again similar to *Maxfield*, the evidence here did not establish that the home health nurses ever lost their autonomy to act as a result of the alleged coercion. On the contrary, several home health nurses did, in fact, continue to use DME vendors other than MPAC and thus retained their autonomy to choose whichever DME supplier they wished. At best, some home health nurses felt subjectively pressured to recommend MPAC. But this is consistent with encouragement, not an enforceable requirement.

Moreover, the testimony of the home health nurses who did choose MPAC indicates that their choice was made not because the defendants coerced or forced them to do so, but because they thought it beneficial to their home health agency. Thus, it was not the "veiled fist" of the defendants which motivated the home health nurses, it was instead their own self interest.

Finally, as in *Maxfield*, no evidence was presented that any of the defendants ever attempted to retaliate or enforce their policy in the face of non-compliance. The evidence in the best light for the plaintiff in this case was that the hospital encouraged, perhaps vigorously so, the home health nurses to order DME equipment from MPAC; however, if a home health nurse, patient or doctor decided to do otherwise, as many did, the hospital and Mark

Bowers respected that choice and did not penalize anyone for their choice.

In sum, there simply is no "coercive" or "restrictive" link—no evidence of threats, of loss of autonomy, or of enforcement—between the fact that the hospital established a policy encouraging the home health nurses to select MPAC and the fact that some, though not all, home health nurses did so. Without such a link, *Maxfield* dictates that the inference of coercion is unreasonable as a matter of law. *Cf. Cia. Petrolera Caribe, Inc. v. Avis Rental Car Corp.*, 735 F.2d 636, 638 (1st Cir.1984).

Other indicators of unlawfully restrictive or exclusionary antitrust behavior are similarly absent in this case. To determine what is unreasonably exclusionary or restrictive, courts often consider whether the behavior is economically irrational or anticompetitive, whether the behavior has an exclusionary or restrictive impact on the patients (consumers), home health nurses, doctors and other DME suppliers and "whether [the conduct] has impaired competition in an unnecessarily restrictive way." *Aspen Skiing Corp. v. Aspen Highlands Skiing Corp.*, 472 U.S. at 605, 105 S.Ct. at 2859; *see also* 3 P. Areeda & D. Turner, *Antitrust Law* § 78 (1978).

An important indicator of unreasonably restrictive or exclusionary behavior is economically irrational or anticompetitive behavior. *See Aspen Skiing Corp. v. Aspen Highlands Skiing Corp.*, 472 U.S. at 605, 105 S.Ct. at 2859; *see also* R. Bork, *The Antitrust Paradox* 138 (1978). Such conduct is often marked by predatory pricing or, as in *Aspen Skiing*, elimination of cooperation with a competitor requiring the voluntary loss of profits. In the instant case, however, the defendants' conduct was nothing more than ordinary, rational and profitable marketing practices. The defendants entered a joint venture and thereafter recommended, but did not require, that the home health nurses use the joint venture. Moreover, patients, doctors and home health nurses had the freedom

to choose DME suppliers other than MPAC and the defendants respected that choice. In short, the Court can find none of the typical anti-competitive or economically irrational behavior that is normally associated with illegal antitrust behavior.

Behavior that restricts or inhibits the consumers' freedom to choose is indicative of unreasonably exclusionary conduct. *Aspen Skiing Corp. v. Aspen Highlands Skiing Corp.*, 472 U.S. at 605, 105 S.Ct. at 2859; *see, e.g., Satellite Financial Planning v. First Nat. Bank*, 643 F.Supp. 449, 452 (D.Del.1986). The focus on the consumer is significant because it illustrates a fundamental flaw in the jury's finding that the defendant's behavior was unreasonably exclusionary. Throughout its case and in argument to the jury, the plaintiff focused the inquiry on the effect the joint venture had on the home health nurses' ability to choose a DME vendor. But the home health nurses are not the consumers of the DME, the patients are. And it was stipulated and uncontradicted that the patient—the consumer—always had the freedom to choose any DME vendor he or she desired and that this freedom was not restricted. The defendants' behavior was not unreasonably exclusionary or restrictive vis-a-vis the consumer.

Moreover, to the extent that the home health nurses are important, the evidence was clear that the nurses could, and many did, continue to use any DME supplier they chose.[5] This is also true of the doctors who could and did choose DME vendors other than MPAC if they indicated such a choice on the patient's chart. The stark fact is that Venice hospital and MPAC never excluded or restricted the patients, the home health nurses or the doctors from choosing any DME supplier they desired. The defendants encouraged the choice of MPAC, but they did not exclude or restrict an alternate choice. Consequently,

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[5] *See supra*, p. 1517 (discussion of home health nurses' autonomy).

the defendants' behavior was not unreasonably exclusionary vis-a-vis the home health nurses or the doctors.

Similarly, other DME vendors were not unreasonably excluded or restricted from competing in the Venice DME market. It is important to remember that plaintiffs complain of being excluded from only *one* source of DME patients —referrals from Venice hospital. The plaintiffs by their own admission could compete for the DME patients coming from other sources, including street walk-ins, nursing homes, physical therapists and physicians. Plaintiffs thus had other competitive options in the DME market; merely because those options may have been unpalatable does not mean they were non-existent.[6] Accordingly, defendants' behavior, even if it was everything plaintiffs' alleged, did not unreasonably exclude other DME suppliers from continuing to compete in the Venice DME market.

The plaintiffs also argued that the Venice hospital's "no solicitation" rule demonstrated that other DME vendors were excluded from competition. But the uncontradicted facts indicated that the "no solicitation" rule was in effect before the joint venture and thus could not constitute evidence that the defendants behaved improperly after the joint venture was established. Moreover, it was stipulated that the defendants offered all hospital patients a choice of any DME supplier by providing, at the hospital's expense, a brochure to each patient needing DME listing all the local DME suppliers, including plaintiff. This gratuitous gesture went beyond defendants' obli-

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[6] Indeed, the evidence indicated that plaintiffs did not even attempt to pursue other competitive options before filing this lawsuit. Plaintiffs did not seek to attract more walk-in customers by relocating their store, which was then located behind a dumpster and next to a bar. Nor did plaintiffs shift their marketing focus to nursing homes or physicians and physical therapists. Instead, plaintiffs passively waited for the telephone to ring, and when it did not, they were content to compete in the courtroom instead of the marketplace.

gation to plaintiffs,[7] *see Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 377-78 (7th Cir.1986), *cert. denied*, 480 U.S. 934, 107 S.Ct. 1574, 94 L.Ed.2d 765 (1987), and further indicates that the defendants did not go about to unlawfully exclude the plaintiffs from competition.

To be sure, MPAC was permitted some advantages other DME suppliers were not, but conduct is not unreasonably exclusionary or restrictive merely because it works to one competitors advantage or does not provide identical benefits to all competitors. Indeed, if that were the case, a hospital could never recommend an affiliated company when patients, doctors or home health nurses did not express a choice, nor could a hospital refer patients to specific doctors or establish exclusive contracts with pathologists or anesthesiologists. *Cf. Drs. Steuer & Latham v. Nat. Med. Enterprises*, 672 F.Supp. 1489 (D.S.C. 1987) (exclusive contract between hospital and pathologists not violative of antitrust laws). This, of course, would be an anomalous result not mandated by the antitrust laws.

In sum, the underlying policy and purpose of the antitrust laws is to protect competition, not competitors. *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 110, 107 S.Ct. 484, 489, 93 L.Ed.2d 427 (1986); *N.C.A.A. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 107-108, 104 S.Ct. 2948, 2963-64, 82 L.Ed.2d 70 (1984); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977); *Brown Shoe Co. v. United States*, 370 U.S. 294,

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[7] The brochure also indicates that the defendants did not refuse to deal with the plaintiff; such a refusal is another indicator of unlawful exclusionary or restrictive behavior not present here. *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. at 602-03, 105 S.Ct. at 2857-58; *Lorain Journal Co. v. United States*, 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162 (1951).

320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962). It follows, therefore, that liability under the antitrust laws results only when competition, rather that any specific competitor, is injured. *Id.; see also Cascade Cabinet Co. v. Western Cabinet & Millwork*, 710 F.2d 1366, 1373 (9th Cir. 1983) ("economic injury to a competitor does not equal injury to competition.") In the present case, although the plaintiff, a specific competitor, was injured by the joint venture, competition as a whole was not. The defendants' conduct was economically rational, it did not exclude or restrict the freedom of the patients, home health nurses, or doctors to choose the DME vendor of their liking, nor did it unreasonably exclude other DME suppliers from competing in the DME market. Consumers did not complain about the joint venture, suppliers were not excluded from the market, prices actually dropped, and market concentration actually diminished. The evidence simply does not support a finding that defendants behavior was coercive or unreasonably exclusionary, or, in other words, that competition was injured. As a consequence, the jury's condemnation of defendants' behavior as illegal antitrust conduct was in error and its verdict on special interrogatories I, II, III [8], IV and V must be reversed.

III. State Law Tortious Interference Claim

In special interrogatory VI, the jury found that the defendants MPAC and Venice hospital tortiously inter-

[8] Although a § 2 conspiracy to monopolize claim does not require the showing of any affirmative antitrust behavior, *see United States v. Griffith*, 334 U.S. at 106-07 & n. 9, 68 S.Ct. at 945-46 & n. 9; 3 J. von Kalinowski, *Antitrust Laws and Regulation*, § 9.02(1)a (1981), such behavior was the only evidence plaintiffs offered in support of their conspiracy to monopolize claim. Because the Court has found above that the defendants' behavior did not violate the antitrust laws, the plaintiffs' § 2 conspiracy to monopolize claim must also fail.

fered with the plaintiff's business relationship with the home health agencies in violation of Florida state law. To establish this claim, Florida law requires the plaintiff to show: (1) the existence of an advantageous business relationship; (2) knowledge of the relationship on the part of the defendant; (3) an intentional and unjustified interference with the relationship by the defendant; (4) damage to the plaintiff. *Tamiami Trail Tours, Inc. v. J.C. Cotton*, 463 So.2d 1126, 1127 (Fla. 1987). Florida law defines an unjustified interference as one made to cause injury, made out of spite, or made as the result of illegal conduct (such as antitrust behavior) or threats. *See Jury Instructions* at D-125 p. 85. Conversely, an interference is justifiable if it has a legitimate business purpose other than interfering with plaintiff's business relationship. *Id.*

The record evidence, taken in the light most favorable to the plaintiff, does not support the inference that the defendants' interference was unjustifiable. Indeed, as the Court has found above, the evidence in its best light to plaintiffs indicates that the defendants did no more than encourage the home health nurses to use MPAC, that this was reasonable business behavior motivated by economical considerations, and that this actvity did not constitute illegal antitrust behavior. Without the presence of illegal antitrust behavior, a major predicate for an unjustified interference is lost. *Id.* And, in fact, this loss is fatal to the interference claim since plaintiffs did not establish, nor allege, that the interference was grounded in spite or in a specific intent to cause plaintiff injury—the other possible predicate conduct underlying a unreasonable interference. Consequently, the evidence does not support the inference that the defendants unjustifiably interfered with the plaintiff's business relations and the jury's verdict in special interrogatory VI must be reversed.

IV

The plaintiff has also filed a motion for attorneys fees and costs. Because of the disposition of the defendants' motion for judgment notwithstanding the verdict, this motion must be denied.

* * * *

For the reasons stated, it is

ORDERED:

1. That the defendants' motion for judgment notwithstanding the jury's verdict (D-135) is GRANTED and the clerk is directed to enter judgment notwithstanding the jury's verdict in favor of all defendants and against plaintiffs on all claims made by plaintiff.

2. That the defendants' alternative motion for a new trial is DENIED.

3. That the plaintiff's motion for attorney fees and costs is DENIED.

DONE AND ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 89-3086

KEY ENTERPRISES OF DELAWARE, INC.,
Plaintiff-Appellant,
v.

VENICE HOSPITAL, SAMMETT CORPORATION AND
MEDICARE PATIENT AIDS CENTER,
Defendants-Appellees,

GULF AREA DIVERSIFIED SERVICES, ET AL.,
Defendants.

Appeal from the United States District Court
for the Middle District of Florida

Nov. 10, 1992

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion December 28, 1990, 11th Cir., 1991,
919 F.2d 1550)

Before TJOFLAT, Chief Judge, FAY, RONEY, HATCHETT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK and CARNES, Circuit Judges.*

BY THE COURT:

A member of this court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in this court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the above cause shall be reheard by this court en banc. The previous panel's opinion is hereby VACATED.

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* Senior U.S. Circuit Judge Thomas A. Clark has elected to participate in further proceedings in this matter pursuant to 28 U.S.C. § 46(c).

Supreme Court, U.S.
FILED
MAY 9 1994
OFFICE OF THE CLERK

No. 93-1365

In The

Supreme Court of the United States

October Term, 1993

THE SAMMETT CORPORATION,

Petitioner,

v.

KEY ENTERPRISES OF DELAWARE, INC.,

Respondent.

On Petition for A Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

BRIEF IN RESPONSE

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STATEMENT OF THE CASE

Respondent, Venice Hospital, agrees with the Statement of the Case contained in the Sammett Corporation's Petition for Writ of Certiorari (Pet. 2-7), with the following additions or corrections:

Venice Hospital assumed it had settled its portion of the case and did not orally argue or file an en banc brief before the Eleventh Circuit. However, Venice Hospital did move for leave to file an amicus brief, and was granted leave to proceed as an amicus curiae, generally supporting the position of The Sammett Corporation. See, Pet. App. 14a, n. 13.

Though the Settlement Agreement did not require Respondent VCA to execute a release to Venice Hospital, it did specifically require VCA to give Venice Hospital a satisfaction of judgment after the case was returned to the district court (which judgment was that to be entered on the contemplated reinstated jury verdict). See, Pet. App. 5a. Venice Hospital contemplated that the judgment and satisfaction thereof would have a res judicata or collateral estoppel effect on future litigation against Venice Hospital by VCA, regardless of self-serving statements made by VCA in the joint motions presented to the Eleventh Circuit.

ARGUMENT

THE ELEVENTH CIRCUIT ACTED ERRONEOUSLY AND INCONSISTENTLY WITH THIS COURT'S PRECEDENTS WHEN IT VACATED THE JUDGMENT OF THE DISTRICT COURT.

Respondent, Venice Hospital, agrees with Petitioner, The Sammett Corporation that vacatur of the district

court's original judgment as applied in the Eleventh Circuit opinion is erroneous and does not serve the interest of the parties or judicial economy. See, Pet. 7-14.

Venice Hospital emphasizes that it has agreed to settle this case with Respondent VCA, but the settlement is now executory because of ambiguity in the Eleventh Circuit opinion which ambiguity would be resolved by the Court ruling on this Petition for Writ of Certiorari. Although Venice Hospital considers itself no longer a party to this action, it finds itself compelled to support the Petition for Writ of Certiorari as the Court has required it to respond.

The Eleventh Circuit's opinion makes the effect of the settlement ambiguous. The Eleventh Circuit's opinion is confusing in that it does not advise the trial court or the parties what sort of judgment is to be entered on remand. Due to this omission, the preclusive effect of the prior litigation on the second suit requesting additional damages from the original defendants for the time period forward from the settlement, based on exactly the same causes of action, as discussed in the Petition at 10, is completely unclear. If the judgment entered reinstates the district court's JNOV opinion, as Petitioner Sammett seeks, it would have the effect of res judicata or collateral estoppel on the second suit. The judgment would also have such an effect if it reinstates the jury verdict, as originally provided in the settlement agreement. Pet. App. 5a. The judgment will also have such an effect if it dismisses the case with prejudice. *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955).

However, since the Eleventh Circuit's opinion does not specify what sort of judgment will be entered on remand, it is vague as to the res judicata effect Venice Hospital intended in agreeing to the settlement providing for entry of a judgment and satisfaction thereof. The Eleventh Circuit effectively has rewritten the settlement agreement as intended by the parties and could arguably expose Venice Hospital and The Sammett Corporation to re-litigation of the same issues in a second lawsuit.

CONCLUSION

For the foregoing reasons, and those suggested in the Petition for Writ of Certiorari, Respondent, Venice Hospital, respectfully submits that the Court should grant the Petition to modify the judgment of the Eleventh Circuit and order it either to reinstate the judgment of the district court or specify entry of another form of judgment on the merits, which will have a preclusive res judicata effect on similar litigation between the parties.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE SAMMETT CORPORATION,
Petitioner,

v.

KEY ENTERPRISES OF DELAWARE, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONER'S REPLY

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PETITIONER'S REPLY

INTRODUCTION

While conceding all of the essential facts, Respondent fails to come to grips with the anomalous and inappropriate result of the Eleventh Circuit's automatic and unreasoning imposition of vacatur in this case based upon the court's erroneous premise that this routine practice was commanded by this Court's decision in *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950), and related cases. Petitioner, indisputably a party throughout this action, prevailed in the district court, did not participate in the other parties' settlement arrangement aborting the appeal in which Petitioner vigorously was defending its position, and actively opposed vacatur. Nevertheless, the circuit court's action stripped Petitioner of the benefit of its judgment, imposed burdens upon it as to which Petitioner obtained no benefit because it had not

settled, and freeing Respondent from the necessity of prosecuting an appeal, allowed Respondent to sue Petitioner yet again on precisely the theory rejected as a matter of law in the district court's now-vacated opinion. This unfair and uneconomical result is hardly what this Court contemplated in *Munsingwear* and, given the arbitrary and inconsistent manner in which the courts of appeals, including the Eleventh Circuit, have been applying the doctrine of that case, this Court should grant this petition, resolve the legal conflict and reinstate the district court's judgment herein.

ARGUMENT

I. THE COURTS OF APPEALS HAVE APPLIED *MUNSINGWEAR* INCONSISTENTLY

Respondent is demonstrably incorrect in arguing that the proper application of *Munsingwear* is clearly understood. In granting certiorari in *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 113 S. Ct. 1249, *cert. dismissed as improvidently granted*, 114 S. Ct. 425 (1993), this Court recognized the wide split among the circuits as to the granting of vacatur when cases are settled on appeal. *See* Petition for Writ of Certiorari at pp. 14-19, and authorities cited therein. If Respondent's argument about clarity were correct, there simply would not be this panoply of inconsistent appellate determinations.

II. *MUNSINGWEAR* DOES NOT AUTOMATICALLY REQUIRE VACATUR WHEN A CASE SETTLES ON APPEAL

As we noted previously, neither *Munsingwear* nor *Duke Power Co. v. Greenwood County*, 299 U.S. 259 (1936), involved the occurrence of mootness as the result of settlement, and its application, therefore, cannot be assessed (as Respondent would have it) simply by reference to whether or not the parties have requested vacatur. The rationale for the precedent is broader, and it is inapplicable here.

Munsingwear and its progeny are premised on the rationale that a party whose appeal becomes moot through happenstance—arguably not because of self-initiated action—has lost its opportunity for judicial review, and so lower court determinations should not be given preclusive effect as to that party. Here, however, it was Respondent, not Petitioner, who had appealed, and it is Respondent who, gaining the windfall of release from having to appeal, is gratuitously stripping Petitioner of the benefit that it had won.[1]

Clearly, the *Munsingwear* doctrine should not apply to a situation where mootness is not happenstance but instead was created by a party who seeks adversely to affect the rights of another party who opposed the settlement. *See Karcher v. May*, 484 U.S. 72 (1987); *In re Memorial Hospital*, 862 F.2d 1299 (7th Cir. 1988). *See also Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971); *Montana v. United States*, 440 U.S. 147 (1979).

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[1] Suggesting that the district court's judgment was "totally discredited" (Brief in Opposition at 19), Respondent argues that Petitioner is attempting "to have its cake and eat it too" by arguing that that judgment must be reinstated. Respondent conveniently misses the point. Although a panel of the Eleventh Circuit indeed would have reversed the district court, a majority of the judges in active service on the court of appeals had enough difficulty with the panel decision to have ordered rehearing *en banc*. The panel's decision was then vacated and, because of the outcome initiated by Respondent but opposed by Petitioner, Respondent was relieved of having to justify before the circuit court as a whole the position of the panel and to demonstrate error in the judgment of the trial court.

Having won in the trial court, Petitioner could not have sought appellate review to gain an advisory opinion. Respondent demands the presumption of a successful appeal without having had to pursue an appeal at all. By initiating yet another suit against Petitioner on a discredited legal theory that has evaded judicial review, Respondent is not only eating its own cake, but that of others as well. It is thus eminently appropriate to restore the district court's judgment.

III. VACATUR HERE CONTRADICTS BOTH THE RATIONALE OF *MUNSINGWEAR* AND THE INTEREST OF JUSTICE

Munsingwear is premised upon a notion of fairness, i.e., that a party who is the victim of happenstance should not be prejudiced by it. However, the Court clearly understood that a party that truncates its appellate rights without settlement would be governed by res judicata and collateral estoppel emanating from the underlying judgment. *Munsingwear*, 340 U.S. at 39. Here, fairness must dictate that a party who did not enter into settlement—indeed, who opposed it—obtain the benefits of issue preclusion where its defeated opponent ends its appeal through a settlement from which it benefits. *See In re Memorial Hospital*, 862 F.2d at 1301.

IV. THIS COURT'S DISPOSITION OF THE *U.S. BANCORP MORTGAGE COMPANY* CASE WILL NOT RESOLVE THE INSTANT CASE

In *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 2 F.3d 899 (9th Cir. 1993), *cert. granted*, 114 S. Ct. 681 (Jan. 10, 1994) (No. 93-714), this Court has asked for briefs and oral argument on the issue of whether *Munsingwear* makes it appropriate for this Court to vacate a decision of a court of appeals where the parties have settled and a motion for vacatur has been filed by one of them. By its very nature, that case does not raise the issue of the effect of vacatur routinely imposed by a circuit court, where a party refused to settle and opposed vacatur and, having been stripped of the precedential value of the judgment it won with its opponent having avoided appellate review, has been sued again on the very theory it had once defeated. *U.S. Bancorp* thus will not dispose of the very real issue presented where vacatur is imposed upon a nonsettling party that had gained this Court's attention in *Izumi*, and which highlights the profound tension among the decisions of the courts of appeals. The case at bar, therefore, should be reviewed notwithstanding *U.S. Bancorp*.

CONCLUSION

For the reasons stated both herein and in its petition, Petitioner respectfully submits that the Court should grant the petition and should reverse the judgment of the Eleventh Circuit and order the reinstatement of the judgment of the district court.

Respectfully submitted,

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Respondent.

On Petition for A Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

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I. STATEMENT OF THE CASE[1]

Respondent, KEY ENTERPRISES OF DELAWARE, INC., d/b/a VCA Medical Supply ("VCA"),[2] filed a Complaint on July 3, 1985, against, among others, Petitioner, The Sammett Corporation ("Sammett"), Venice Hospital, and Medicare Patient Aid Centers ("MPAC"). VCA alleged in its Complaint that the Defendants foreclosed vendors of Durable Medical Equipment ("DME"), including VCA, from competing in the DME leasing market in the Venice and Englewood, Florida area, thereby injuring VCA and substantially affecting competition in those product and geographic markets.

A jury trial on VCA's claims commenced on February 24, 1988, and concluded on March 9, 1988. The jury was presented with thirty-two (32) special verdict interrogatories, asking whether VCA proved that the Defendants had engaged in (1) an unlawful conspiracy and restraint of trade under § 1 of the Sherman Act; (2) unlawful monopolization, attempted monopolization, conspiracy to monopolize, and/or monopoly leveraging under § 2 of the Sherman Act; and/or (3) tortious interference with business relations under Florida common law.

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[1] Respondent submits this Statement of the Case in order to provide the Court with the pertinent factual background of this case and its unique procedural setting.

[2] Pursuant to Supreme Court Rule 29.1, Respondent, Key Enterprises of Delaware, Inc., discloses that it is a Florida corporation, and that it has no parent companies, subsidiaries or affiliates at the present time. Respondent respectfully refers the Court to the Petitioner's Corporate Disclosure Statement, at page ii of its Petition for Writ of Certiorari, for the corporate information relating to Petitioner and the other Appellees below.

On March 11, 1988, the jury found in favor of VCA on *each* of its claims and awarded VCA $760,983.00 in damages—the precise dollar amount requested by VCA. On March 14, 1988, judgment was entered in favor of VCA for the sum of $2,282,949.00, reflecting a trebling of the damages award, with interest and costs.

On March 28, 1988, the Defendants filed a Motion for Judgment Notwithstanding the Jury's Verdict, or Alternatively for a New Trial, or for a Remittitur. By a Memorandum Decision and Order rendered over nine months later, on January 19, 1989, the District Court granted the Defendants' Motion, entering judgment for the Defendants notwithstanding the jury's verdict on each of the six claims advanced by VCA. Pet. App. 52a-65a. VCA filed a Notice of Appeal to the U.S. Court of Appeals for the Eleventh Circuit on February 1, 1989.

In its appeal, VCA argued, among other points, that the District Court disregarded thestandard for evaluating a Motion for Judgment Notwithstanding the Jury Verdict, by selectively and qualitatively reviewing the evidence presented to the jury. VCA also argued that the District Court misapplied the antitrust laws, relying on a § 1 tying arrangement decision as dispositive of all of VCA's claims. VCA did not submit a tying claim to the jury, and the tying case relied upon by the District Court, *Bob Maxfield, Inc. v. American Motors Corp.*, 637 F.2d 1033 (5th Cir.), *cert. denied*, 454 U.S. 860 (1981), has never been extended by any court to a non-tying claim brought under § 1 of the Sherman Act.

In a unanimous 3-0 decision rendered on December 28, 1990, a panel of the Eleventh Circuit reversed

the decision of the District Court and remanded with directions to reinstate the jury verdict in favor of VCA. Pet. App. 15a-51a. The Eleventh Circuit panel,[3] in a 19-page decision[4] that it based on a number of longstanding decisions rendered by this Court, found that the jury's verdict in favor of VCA was supported by "substantial evidence." The Eleventh Circuit panel thoroughly rejected the District Court's reasoning, particularly its misreliance on *Bob Maxfield*: "[T]he district court erred by applying the strict tying standard for coercion to this reciprocal dealing case." Pet. App. 34a. The panel's decision has since been cited with approval by a number of courts, including this Court.[5]

On January 17, 1991, Venice Hospital, Sammett and MPAC filed a Petition for Rehearing and Suggesting for Rehearing En Banc (the "Petition for Rehearing"). However, while the Petition for Rehearing was pending, VCA and Venice Hospital agreed upon a settlement of this case, pursuant to which Venice Hospital paid VCA $3,272,111.11. This amount represented the full amount of the treble damages awarded to VCA by the jury, plus VCA's taxable costs, including its attorneys' fees through appeal, but specifically excluding any post-judgment interest.[6]

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[3] Senior Circuit Judge Thomas A. Clark authored the opinion and was joined by Circuit Judge Phyllis A. Kravitch and Senior District Judge C. Clyde Atkins (sitting by designation).

[4] *See Key Enterprises of Delaware, Inc. v. Venice Hosp.*, 919 F.2d 1550 (11th Cir. 1990).

[5] *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. ___, 122 L. Ed. 2d 247, 255 n.5, 113 S. Ct. ___ (1993).

[6] The post-judgment interest, accruing at 6.71% per annum

VCA reserved the right to pursue the unpaid post-judgment interest and any additional taxable costs, including attorneys' fees, incurred by VCA through the duration of the appeal, against Sammett and MPAC, who did not participate in the settlement.

As part of the settlement between the parties, Venice Hospital agreed to withdraw its Petition for Rehearing still pending before the Eleventh Circuit, and to jointly move with VCA to involuntarily dismiss the balance of the Petition for Rehearing brought by Sammett and MPAC. Accordingly, on November 13, 1991, VCA and Venice Hospital filed a Joint Motion for Withdrawal of Venice Hospital's Petition and for Immediate Issuance of Mandate, together with a separate Joint Motion for Involuntary Dismissal of Sammett's and MPAC's Petition. Both of the Joint Motions asked the Eleventh Circuit to enter a judgment reinstating the jury's verdict in favor of VCA consistent with the unanimous Eleventh Circuit panel decision. Significantly, neither VCA nor Venice Hospital moved to vacate the District Court's judgment.

Sammett and MPAC opposed the Joint Motions on November 15, 1991, in part due to their concern of the potential res judicata effect that the case, as settled, might have on MPAC and Sammett in any future case that might be brought by VCA against them. As Sammett and MPAC argued at page 2 of their opposition, "nothing prevents appellant Key Enterprises from claiming that this case is res judicata against both MPAC and Sammett with regard to all

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since the date of the original judgment in March 1988, exceeded $550,000.00 by the time of the settlement between VCA and Venice Hospital.

damages that may have been incurred after the date of the jury verdict."

In an Order dated February 5, 1992, the Eleventh Circuit panel refused to dismiss the Petition for Rehearing. The panel explained that it could not "approve a settlement that requires withdrawal of a joint petition for rehearing and issuance of a mandate" when not all the parties had joined the motion.

On or about April 17, 1992, while the Petition for Rehearing remained pending before the Eleventh Circuit, VCA brought a new action ("VCA II") against Venice Hospital, Sammett and MPAC for ongoing conduct in violation of the antitrust laws. Despite the jury verdict in March 1988 and the Eleventh Circuit panel decision in December 1990 against them, *and* Venice Hospital's payment in full of the damages awarded to VCA (excluding any post-judgment interest) in November 1991, the Defendants continued to engage in many of the same anti-competitive acts that illegally channeled hospital patients to MPAC. In fact, as VCA alleged in its new Complaint, the Defendants' actions since the jury verdict in the first case had become even more pernicious, in that MPAC had substantially increased its DME prices in the market that it had monopolized, to the detriment of the consumer. MPAC's monopolistic stranglehold over the Venice DME market permitted it to maintain those higher prices—ranging from 27% to 190% higher than those offered by VCA for the same DME—without losing patient referrals from Venice Hospital, the source of most of the DME business in the Venice market.

Sammett and MPAC responded to VCA II by filing in VCA I, before the Eleventh Circuit, a Motion to Compel Dismissal or in the Alternative to Stay. Sam-

mett and MPAC argued that VCA's second Complaint, which sought damages in addition to those awarded in its first action, must be dismissed under principles of res judicata. Alternatively, Sammett and MPAC, acknowledging that res judicata requires a final judgment on the merits in a prior suit, argued that VCA II should be stayed until the Eleventh Circuit rendered a final ruling in VCA I. Sammett and MPAC contended, at page 9 of their Memorandum in Support of Motion to Compel Dismissal or in the Alternative to Stay (dated May 6, 1992), that "a judgment in favor of Petitioners in *Key I* would foreclose Respondents from pursuing their claims under *Key II*." VCA disputed this claim in its response filed on May 19, 1992, arguing at page 7 thereof that "res judicata is inapplicable here because *Key II* does not attempt to relitigate claims already tried to the jury in *Key I*, nor does it raise claims which *could* have been litigated in that prior action."

The Eleventh Circuit never ruled on the Motion to Compel Dismissal or to Stay by Sammett and MPAC. Instead, on November 10, 1992, twenty-two (22) months after the Petition for Rehearing was filed, the Eleventh Circuit decided to rehear the case en banc. Pet. App. 66a-67a. Pursuant to Eleventh Circuit Rule 35, the effect of rehearing the case en banc was to automatically vacate the panel decision and to stay the mandate thereunder.

However, on December 1, 1993, after the case was fully briefed and argued to the en banc Court, the Eleventh Circuit held that it "improvidently issued" its order taking the case en banc, because, it ruled, no case or controversy existed at the time of its order in light of the settlement between VCA and Venice

Hospital. Pet. App. 1a-14a. The Eleventh Circuit therefore vacated its order granting en banc review and returned the case to the panel "with instructions that it dismiss the appeal, vacate the district court's judgment, and remand the case to the district court with instructions to dismiss the case." Pet. App. 14a.

Sammett filed the instant Petition for Writ of Certiorari on March 1, 1994, objecting to the Eleventh Circuit's vacation of the District Court's judgment notwithstanding the jury verdict.

II. SUMMARY OF ARGUMENT

This Court's decision in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), and its progeny required the Eleventh Circuit to vacate the District Court's judgment in this case. This Court has consistently applied *Munsingwear* to vacate district court judgments in cases that have become moot on appeal, whether due to settlement or otherwise.

In addition, contrary to the artifice created in the Petition, the Eleventh Circuit's opinion does not conflict with rulings by other Circuit Courts of Appeals. Petitioner cites decisions by other Circuits on motions to vacate district court judgments, typically involving settlements that were conditioned on the vacation of the district court judgments at issue. This case, however, does not involve a request by any party to vacate the District Court's judgment; rather, both of the settling parties, VCA and Venice Hospital, simply moved to dismiss the Petition for Rehearing then pending before the Eleventh Circuit, and thereby uphold the well-reasoned opinion of the Eleventh Circuit panel.

III. ARGUMENT

1. This Court Has Consistently Applied *Munsingwear* To Vacate District Court Judgments In Cases Mooted On Appeal.

This Court's decision in *Munsingwear*, and its progeny, required the Eleventh Circuit to vacate the District Court's judgment based on the mootness of this case following the settlement between VCA and Venice Hospital.[7] This Court noted in *Munsingwear* that "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *Munsingwear*, 340 U.S. at 39. The *Munsingwear* Court emphasized that this was " 'the duty of the appellate court.' " *Id.* at 40 (quoting *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936)).

This Court explained its ruling in *Munsingwear* as follows:

> That procedure [of vacatur] clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is

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[7] Petitioner does not dispute in its Petition that the appeal became moot following the settlement between VCA and Venice Hospital. VCA is likewise assuming, for purposes of this Brief in Opposition, that the appeal was rendered moot by its settlement with Venice Hospital.

> prejudiced by a decision which in the statutory scheme was only preliminary. *Id.* at 40.

The basic policy advanced by this procedure is "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.* at 41.

Consistent with *Munsingwear*, the Eleventh Circuit's vacation of the District Court's judgment "clears the path for future relitigation of the issues between the parties." VCA is now free to litigate VCA II against Venice Hospital, Sammett and MPAC. Were the District Court's judgment to remain intact, on the other hand, Petitioner would argue that VCA II is barred by res judicata.[8] Indeed, Petitioner previously argued this position in the Motion to Compel Dismissal or in the Alternative to Stay that it filed in the Eleventh Circuit, following the filing of VCA II. The purpose of the instant Petition, moreover, is to revive the District Court's judgment so that Petitioner may attempt to utilize it to defeat, on res judicata grounds, VCA II. Petitioner even concedes this motive in its Petition. *See* Pet. at 11 (acknowledging "the issue preclusion sought by Petitioner"). However, the *Munsingwear* doctrine would be directly contravened by such a result, for then the District Court's judgment, "unreviewable because of mootness," would "spawn" grave legal consequences to VCA and its new action.

Based on *Munsingwear*, this Court has consistently vacated district court judgments in cases that have become moot during the appeal process. For instance,

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[8] VCA would, of course, vigorously oppose any such res judicata argument by the Petitioner.

in *Great Western Sugar Co. v. Nelson*, 442 U.S. 92 (1979), this Court reviewed a Tenth Circuit ruling that dismissed an appeal on the ground of mootness but expressly allowed the judgment of the trial court to stand. The Court began its analysis by quoting its prior decision in *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936):

> Where it appears upon appeal that the controversy has become entirely moot, it is the *duty* of the appellate court to set aside the decree below and to remand the cause with directions to dismiss. (Emphasis supplied.) *Great Western*, 442 U.S. at 93.

The Court noted that "[t]he course of action prescribed in *Duke Power* has been followed in countless cases in this Court." *Id.* (citations omitted). Accordingly, the Court held that the Tenth Circuit's ruling that the district court judgment would remain in effect notwithstanding the mootness of the appeal thereof was "totally at odds with the holding of *Duke Power*." *Id.* The Court explained that "[t]he reasons for not allowing the District Court judgment to remain in effect when the fact of mootness had been properly called to the attention of the Court of Appeals were fully stated in [*Munsingwear*]." *Id.* at 93-94.

Petitioner seeks in this case that which was specifically rejected by the Court in *Great Western*. While Petitioner does not dispute the Eleventh Circuit's dismissal of this appeal on the ground of mootness, it urges this Court to reinstate the District Court judgment. Yet even were the Eleventh Circuit or this Court to approve of the reasoning of the District

Court in entering a judgment notwithstanding the jury verdict, that approval cannot excuse a "failure to follow the teaching of *Duke Power*." *Great Western*, 442 U.S. at 94. Consistent with *Munsingwear*, *Great Western* requires that when an appeal becomes moot, it must be dismissed *and* the district court judgment must be vacated.

This Court has previously declined to carve out any exceptions to the *Munsingwear* rule. For instance, in *New Left Educ. Project v. Board of Regents of the Univ. of Tex. Sys.*, 472 F.2d 218 (5th Cir. 1973), the Fifth Circuit sought to except from *Munsingwear* any appeals that have become moot through actions of the appellant, such as where the appellant settles the action. *Id.* at 221. The Fifth Circuit's decision to leave the district court judgment intact was summarily vacated by this Court, with instructions to dismiss the case as moot. *Board of Regents of the Univ. of Tex. Sys. v. New Left Educ. Project*, 414 U.S. 807 (1973). *Accord Security Bancorp v. Board of Governors of the Fed. Reserve Sys.*, 655 F.2d 164 (9th Cir. 1980), *vacated*, 454 U.S. 1118 (1981).

Indeed, both before and after *Munsingwear*, this Court has summarily vacated judgments in cases settled while pending on appeal. *See, e.g.*, *Hammond Clock Co. v. Schiff*, 293 U.S. 529 (1934); *Stewart v. Southern Ry. Co.*, 315 U.S. 283 (1942); *Black v. Amen*, 355 U.S. 600 (1958); *J. Aron & Co. v. Mississippi Shipping Co.*, 361 U.S. 115 (1959); *Lake Coal Co., Inc. v. Roberts & Schaefer Co.*, 474 U.S. 120 (1985); *City Gas Co. of Fla. v. Consolidated Gas Co. of Fla., Inc.*, 499 U.S. 915 (1991).[9]

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[9] Petitioner concedes that the *Munsingwear* doctrine "fre-

Notwithstanding all of the foregoing decisions by this Court that have applied the *Munsingwear* doctrine of vacatur to cases that have become moot on appeal, Petitioner argues that vacation is inappropriate here in light of the Court's decision in *Karcher v. May*, 484 U.S. 72 (1987). However, while Petitioner accurately states the facts in *Karcher*, it misapplies its holding to this case, one that involves entirely different circumstances.

Karcher involved a constitutional challenge to a New Jersey law that authorized a minute of contemplative silence in that state's public schools. The statute was defended, unsuccessfully, in the district court and court of appeals by the two presiding officers of the New Jersey Legislature, Karcher and Orechio. Subsequently, the two officers lost their leadership posts in the Legislature. After an appeal was filed to this Court on behalf of Karcher and Orechio, ostensibly in their leadership capacities, their successors informed the Court that they would not defend the statute and were withdrawing the Legislature's appeal. The new legislative leaders also moved to dismiss the appeal on the ground that the Legislature's withdrawal left the Court without a case or controversy. Karcher, however, sought to continue his appeal despite the change in legislative leadership. Thus, *Karcher* presented the question "whether public officials who have participated in a lawsuit solely in their official capacities may appeal an adverse judgment after they have left office." *Karcher*, 484 U.S. at 74.

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quently has been applied to cases mooted by settlements." Pet. at 8.

This Court ruled in the negative, finding that the proper party "at each point in the proceedings below was the incumbent legislature." *Id.* at 81. After losing their leadership roles in the Legislature, Karcher and Orechio lacked authority to pursue their appeal on behalf of the Legislature. *Id.* As merely individual legislators, Karcher and Orechio were "not 'parties' entitled to appeal the Court of Appeals' judgment under 28 U.S.C. § 1254(2)." *Id.* Thus, this Court dismissed their appeal for want of jurisdiction. *Id.*

Karcher and Orechio then argued that if their appeal must be dismissed, the judgment below must be vacated under *Munsingwear*. They argued that "the rationale underlying the *Munsingwear* procedure applies to this case, for it is the happenstance of their loss of official status that renders the judgment unreviewable." *Id.* at 82.

This Court rejected that argument "because its underlying premise is wrong." *Id.* at 83. The Court explained:

> This case *did not become unreviewable* when Karcher and Orechio left office. Rather, under Federal Rule of Appellate Procedure 43(c)(1), the authority of Karcher and Orechio to pursue the appeal on behalf of the legislature passed to their successors in office. The rules effectuating automatic substitution of public officers were specifically designed to *prevent suits* involving public officers *from becoming moot* due to personnel changes. *Id.* (Emphasis added).

Therefore, the controversy in *Karcher* "*did not become moot* due to circumstances unattributable to any

of the parties." *Id.* (emphasis added). Rather, "[t]he controversy ended when the losing party—the New Jersey Legislature—declined to pursue its appeal. Accordingly, the *Munsingwear* procedure is inapplicable to this case." *Id.*

The *Karcher* Court, then, refused to apply *Munsingwear* not because the action became moot due to the actions of one of the parties, but rather because the case was *not moot* at all. As the Court recognized, Federal Rule of Appellate Procedure 43(c)(1) *prevented* the case from becoming moot upon the change in legislative leadership. Rather than becoming moot, the controversy *ended* when the losing party "declined to pursue its appeal." In short, the controversy had not become "unreviewable due to mootness"; thus, *Munsingwear* was not invoked.

Karcher has no relevance to this case, for Petitioner does not dispute in its Petition that this case was rendered *moot* by the settlement between VCA and Venice Hospital. In addition, unlike the New Jersey Legislature in *Karcher*, VCA never withdrew its appeal of the District Court's judgment. Quite to the contrary, VCA vigorously and consistently challenged the District Court's judgment. VCA, moreover, successfully persuaded all three members of an Eleventh Circuit panel that the District Court's judgment lacked any merit as a matter of fact or law. VCA later sought to sustain the Eleventh Circuit panel decision in its settlement with Venice Hospital, by jointly moving with Venice Hospital to have a judgment entered in favor of VCA in accordance with the Eleventh Circuit panel decision. Finally, VCA urged the entire Eleventh Circuit, after it decided to rehear the case en banc, to reinstate the panel decision in its entirety.

Unlike the facts in *Karcher*, then, this case involves no change in position by the appellant as to the meritorious nature of its appeal. *Karcher* must be limited to its facts. *Karcher* did not carve out an exception to the *Munsingwear* doctrine.

2. The Eleventh Circuit's Opinion Does Not Conflict With Other Circuits' Rulings On Motions To Vacate.

The Eleventh Circuit acted in accordance with *Munsingwear* when it vacated the District Court judgment based on the settlement between VCA and Venice Hospital. In addition, the Eleventh Circuit's ruling does not conflict with rulings in similar cases by other Circuit Courts of Appeals. Petitioner creates an artificial conflict among the Circuits by comparing the Eleventh Circuit's routine application of the vacatur doctrine in this case to decisions rendered by other Circuits on *motions to vacate*, where vacatur was sought by settling parties as an essential term of their settlement.

The fact that there is no conflict created by the Eleventh Circuit's ruling herein is perhaps best demonstrated by contrasting the issue in this case with that presented to this Court in *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 507 U.S. ___, 122 L. Ed. 2d 649, 113 S. Ct. 1249, *cert. dismissed as improvidently granted*, 510 U.S. ___, 126 L. Ed. 2d 396, 114 S. Ct. 425 (1993).

In *Izumi*, the single question presented for this Court's review was: "Should the United States Courts of Appeals routinely vacate district court final judgments *at the parties' request* when cases are settled

while on appeal?" *Izumi*, 126 L. Ed. 2d at 401 (emphasis added). By contrast, the question presented by Petitioner herein does not challenge vacatur in the context of motions to vacate, because here there was no request by either of the settling parties to vacate the District Court judgment. Not only did none of the parties request vacatur, but, as the Petitioner emphasizes in its presented question, it "objected to vacatur" by the Eleventh Circuit. This case, then, does not involve the arguable propriety of parties *requesting* the vacation of a district court judgment in order to effectuate a settlement reached by the parties, as in *Izumi*, but rather an objection to the *routine application* of *Munsingwear* vacatur to cases that have become moot on appeal.[10]

Like *Izumi*, the cases relied upon by Petitioner in its Petition raise issues in procedurally different contexts than that in this case. For instance, in *In re Memorial Hosp. of Iowa County, Inc.*, 862 F.2d 1299 (7th Cir. 1988), the Seventh Circuit denied the parties' motion to vacate the district court judgment, in part because the settlement in that case did *not* make the case moot. *Id.* at 1301. Noting that the settlement required the lower court's approval, the Seventh Circuit held that if such approval were declined, "the dispute is as live as ever." *Id.* In fact, the district court judgment in that case was not "unreviewable

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[10] Petitioner argues that "the instant case presents a useful and appropriate vehicle for the Court to enunciate a consistent national rule delineating the extent to which vacatur should be ordered when a case becomes moot while on appeal." Pet. at 3. This Court, however, has *already* articulated a clear and "consistent national rule" of vacatur, in *Munsingwear* and its progeny.

because of mootness" under *Munsingwear*: "The Department and its fiscal intermediary were not disabled from obtaining review; they have simply chosen, for reasons they deem sufficient, to forego the entitlement they possess." *Id.* Therefore, *Memorial Hospital* closely resembles this Court's ruling in *Karcher*, *supra*, in that neither case was moot for purposes of *Munsingwear*. Here, by contrast, Petitioner does not dispute in its Petition that this case was rendered moot by the settlement between VCA and Venice Hospital.

In explaining the policy reasons behind denying parties' motions to vacate, moreover, the Seventh Circuit in *Memorial Hospital* demonstrates the critical distinction between motions to vacate, brought as part of settlements, and routine vacatur under *Munsingwear*. Specifically, the Seventh Circuit objected to private agreements that seek to "annul" or "expunge" the district court's acts, in an effort by the parties to "rewrite" history. *Memorial Hospital*, 862 F.2d at 1300. As the Seventh Circuit explained, "it may be inappropriate to approve a settlement that squanders judicial time that has already been invested." *Id.* at 1302. "When a clash between genuine adversaries produces a precedent, . . . the judicial system ought not allow the social value of that precedent, created at cost to the public and other litigants, to be a bargaining chip in the process of settlement." *Id.* A court opinion, moreover, "may have great value to strangers--a value that one or another party to today's case may try to appropriate in the settlement, but which is not theirs to sell." *Id.*[11]

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[11] Similarly, in another case relied upon by Petitioner, *Man-*

Unlike the situation in *Memorial Hospital* and other cases involving motions to vacate, the settlement between VCA and Venice Hospital did not seek to "squander judicial time that has already been invested." Rather, the parties' settlement sought to maximize the value of the judicial time spent in this case by sustaining the well-reasoned panel decision of the Eleventh Circuit. The parties' settlement acknowledged and furthered the great social value inherent in the Eleventh Circuit's precedent. In short, VCA's settlement with Venice Hospital endeavored to *preserve* a precedent, not to expunge or *vacate* one.

It is the Petitioner who wants to have its cake and eat it too. The Eleventh Circuit admitted that it "improvidently" decided to rehear this case en banc. Therefore, the Eleventh Circuit returned the case "to the status it occupied when VCA and Venice Hospital informed the court that the controversy had been settled"—after the panel decision reinstating the jury verdict, but before a ruling on the Petition for Rehearing. Pet. App. 8a. In dismissing the appeal due

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ufacturers Hanover Trust Co. v. Yanakas, 11 F.3d 381 (2d Cir. 1993), the Second Circuit held that once a decision that is not reviewable as of right has been rendered, "we decline to allow [the parties] to dictate, by purchase and sale, whether the precedent it sets will remain in existence." *Id.* at 385. Aside from the other reasons stated above, Petitioner's reliance on *Manufacturers Hanover* is misplaced, for the Second Circuit's "refusal to vacate is limited to judgments as to which there is no right of review." *Id.* Thus, in *Manufacturers Hanover*, the Second Circuit refused to vacate *its* prior decision, as opposed to the district court's judgment. If anything, *Manufacturers Hanover* supports continued viability of the panel decision of the Eleventh Circuit in this case, not the District Court judgment that it reversed.

to the settlement, the Eleventh Circuit could hardly revive the totally discredited District Court judgment that was reversed by the unanimous panel. After all, if left standing, the District Court opinion would have perplexed courts for years to come. Courts would have been left struggling for ways to distinguish their cases from a decision that is devoid of merit under well-settled antitrust jurisprudence.[12] The judicial resources "squandered" by such a result would have been tremendous. Thus, if the Eleventh Circuit erred at all, it erred by not issuing a judgment and mandate in accordance with the panel opinion. However, Petitioner cannot have it both ways: If the appeal must be dismissed, so must the District Court judgment be vacated.

IV. CONCLUSION

The Eleventh Circuit followed the longstanding *Munsingwear* rule in vacating the District Court judgment due to the mootness resulting from the settlement between VCA and Venice Hospital. Further, the Eleventh Circuit's action does not conflict with rulings in similar cases by other Circuit Courts of Appeals. The Eleventh Circuit's routine application of *Munsingwear* does not conflict with other Circuits' denials of settling parties' requests to vacate judicial precedents.

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[12] Petitioner's puzzling reference to the District Court judgment as "a judicial precedent that was created with substantial public economic and implied moral investment," Pet. at 13, is belied by the 19-page, unanimous panel decision that systematically refuted the District Court judgment under antitrust principles that have long been articulated and applied by this Court.

For these reasons, Respondent VCA respectfully submits that the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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